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No. 87- .

In the
Supreme Court of the United States

OCTOBER TERM, 1987

GLOBE NEWSPAPER COMPANY AND
DAVID FARRELL,
PETITIONERS,

v.

EDWARD J. KING,
RESPONDENT.

Petition for Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

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Questions Presented for Review

The Boston Globe's State House political columnist wrote in his Sunday column that the then Governor of Massachusetts exhibited a "condescending attitude" toward other state officials as exemplified by a call to a judge to complain of "extraordinarily lenient" sentences in a gang-rape case. The columnist's source was the Massachusetts Treasurer, a friend and ally of the Governor. In this context:

1. Did the lower court err in holding that actual malice may be inferred although the statement was based upon a source whose "veracity and accuracy" the columnist had no obvious reason to doubt, thereby creating a conflict among lower courts over application of the actual malice rule?

2. Is the statement about the Governor actionable or is it protected discussion of governmental activities?

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v.

EDWARD J. KING,
RESPONDENT.

Petition for Writ of Certiorari
to the Supreme Judicial Court of Massachusetts

Petitioners, Globe Newspaper Company and David Farrell, respectfully pray that a writ of certiorari be issued to review the decision of the Massachusetts Supreme Judicial Court dated August 17, 1987.

Opinions Below

The opinion of the Supreme Judicial Court of Massachusetts ("SJC") is reported at 400 Mass. 705, 512 N.E.2d 241 (1987) and is reproduced as Appendix A to this Petition pp. 1a-32a, *infra*.

The Memorandum of Decision of the Superior Court is produced in Appendix B at pp. 33a to 94a.

Jurisdiction

On August 17, 1987, the SJC reversed, in part, summary judgment granted petitioners by the trial court on April 30, 1986. Petitions to the SJC for rehearing were denied on October 28, 1987. *See* Appendices C and D, pp. 95a to 104a, respectively. Jurisdiction of this Court is invoked under 28 U.S.C. § 1257(3) and *Cox Broadcasting Co.* v. *Cohn*, 420 U.S. 469, 482-83 (1975). *See* Part IV, *infra*.

Constitutional Provisions Involved

This case involves portions of the First and Fourteenth Amendments to the Constitution:

> Congress shall make no law . . . abridging the freedom of speech, or of the press . . . .

U.S. Constitution, amendment I

> No state shall make or enforce any law which shall abridge the privileges or immunities of citizens of

> the United States; nor shall any State deprive any person of life, liberty, or property without due process of law . . . .

U.S. Constitution, amendment XIV, § 1

Statement of the Case

Kicking off the 1982 election year, Governor Edward J. King sued the Globe Newspaper Company and three of its writers[1] for $3,600,000, complaining about three editorial page cartoons, one editorial, one op-ed page satire and two opinion section columns which appeared between 1979 and 1981.[2] Defendants asserted a number of defenses, including that the articles were protected by the First Amendment. Four years later, after some 18 depositions, multiple document requests, interrogatories, and requests for admissions, the trial court entered summary judgment for petitioners and dismissed the complaint. The SJC affirmed as to six of the seven articles, but reversed on the seventh for which petitioners now seek review. The circumstances surrounding the seventh article are as follows:

Charged with gang-raping a woman and leaving her naked in a wooded area, five men pleaded guilty to rape, unnatural

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[1] The Globe Newspaper Company publishes *The Boston Globe* and *The Boston Sunday Globe*. It is a subsidiary of Affiliated Publications, Inc. The individual defendants were editorial cartoonist Paul Szep and columnists Robert L. Turner and David Farrell. Plaintiff Edward J. King was elected Governor in 1978 and served from 1979 through 1983. Supreme Court Rule 21.1(b).

[2] The cartoons and text of the articles are appended to the SJC's decision and thus are included in Appendix A at pp. 19a-30a, *infra*. They are collectively referred to herein as "the articles."

rape and malicious destruction of her automobile. *See Aldoupolis* v. *Commonwealth* (and companion cases), 386 Mass. 260, 435 N.E.2d 330, *cert. denied sub nom. Savoy* v. *Massachusetts*, 459 U.S. 864 (1982). Sentenced on Monday, October 5, 1981, the five men walked out of the courtroom on probation and with 3-5 year suspended sentences. They were ordered to pay court costs at $5.00 per week. *Id.* Two days later, on Wednesday evening, October 7, the Governor expressed his "concern" about the sentences on a radio talk show.[3] Exh. 7, Tab 10, Admissions 17, 19.

The next day, Thursday, October 8, the Governor held a press conference,[4] at which time he stated: "For the past two days, my office has been besieged by literally hundreds of calls from people angry over a sentence handed down by a superior court judge . . . Many are angry and outraged. I share their feelings. I appointed this judge." Exh. 7, Tab 24, King Dep., Ex. 26.

At this press conference, the Governor released the text of a letter he was writing to the Chief Justice of the Superior Court requesting "a full explanation as to whether the sentences . . . were or were not consistent with the [sentencing]

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[3] The summary judgment briefs and appendices filed in the trial court were designated as Exhibits 1-8 by the plaintiff-appellant in the SJC. References thereto will be cited as "Exh. , Tab " along with any other information required to make the reference clearer.

[4] The Governor's haste to join the controversy was best evidenced by testimony of his Press Secretary:

> Q. Did anybody give you any further details concerning the trial or events which had taken place at trial?
> A. Just word of mouth.
> Q. But nobody—
> A. We weren't that interested in it.
> Q. You weren't that interested in what?
> A. In the details of what was right or wrong or the trial itself.

Exh. 7, Tab 30, Morris Dep. 128-29.

guidelines." Exh. 7, Tab 10, Admission 12; Tab 24, King Dep. IV 97, Ex. 28. He also released the text of his letter to the Massachusetts Judicial Conduct Commission asking whether it was "in the jurisdiction of the Commission to take any action relative to the conduct of the Judge in the sentencing aspect of this case."[5] Exh. 7, Tab 24, King Dep. IV 95, Ex. 27. The Governor announced he would file legislation enabling prosecutors to appeal felony sentences because of "this week's lenient sentences." Exh. 7, Tab 24, King Dep. IV 98-99, Ex. 29. The next morning, Friday, October 9, the sentencing judge, *sua sponte*, revoked the sentences. Exh. 7, Tab 10, Admission 3; Tab 17, Abrams Dep. 13-14.

A month later, Sunday, November 8, 1981, David Farrell's column — the article in issue — was published in the "Focus on Politics" section of *The Boston Sunday Globe*. The column discussed the Governor's relations with the liquor industry and ended:

> . . . King operates on a one-way street and regards all other state officials — duly elected constitutional officers, elected legislators, judges and other members of the judiciary — as subordinates of the executive, with their principal function to serve him, the master.
>
> That condescending attitude never was more evident than in October when King called a judge and demanded that he change a decision he rendered in a gang-rape case. . . .

(App. 30a.) The Governor's libel action is predicated on the last sentence quoted and his assertion that he had never made such a call.

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[5] The Governor testified he did not know what the powers of the Commission were. Exh. 7, Tab 24, King Dep. IV 96.

During discovery, Farrell ultimately identified State Treasurer Robert Q. Crane as his source for the statement about the call. Farrell and Crane were deposed.

The Treasurer was a friend, ally and fundraiser for the Governor. Exh. 7, Tab 25, King Dep. IV 71-72. The Governor and Treasurer entrusted their legal and tax affairs to the same person — the individual who served as Secretary of Administration and Finance in the Governor's cabinet.[6] (R. 1248, 1251.) The Treasurer testified he "admired [the Governor] then, I admire him now, and I admired him when he went out of office and I walked down the stairs with him." (R. 542.) The Governor testified that he had never had any reason to question the Treasurer's honesty. Exh. 7, Tab 25, King Dep. IV 71-72.

The Treasurer also was a friend of Farrell and confirmed that, at a lunch with Farrell, he said that the Governor was so upset about the sentence in the gang-rape case, that the Governor called the judge, "raised hell about it, and said it was a lousy decision, and it should be changed." Exh. 7, Tab 20, Crane Dep. 117. The Treasurer "saw no significance in the fact that the Governor may or may not have called the judge. I didn't say that as if the Governor did a bad thing." (R. 537.) The Treasurer did not "think [Farrell would] doubt anything I ever told him." (R. 538.) The Treasurer also was specific why Farrell would have believed the statement about the call: "He would believe it for two reasons, one, he knows me, and two, he knows the high esteem I have for Governor King." (R. 539.)[7]

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[6] Citations to the Joint Record Appendix filed in the SJC are cited as (R. .)

[7] Note also the context. On October 8, the Governor held a press conference at which he (a) denounced the sentence; (b) released the text of two letters to judicial regulatory groups questioning the decision and the conduct of the judge; (c) announced he would introduce legislation to toughen up sentencing guidelines. On October 9, one day later, the judge *sua sponte* revoked the sentences.

Farrell testified that the Treasurer had "always" told him the truth. (R. 416.) Moreover, Farrell had "always found [the Treasurer] accurate [*sic*]." *Id.* Farrell also testified, "I've talked to many politicians, including the Senate President and others during the Governor's regime, and they're all . . . amused about the Governor's attitude that he is a take-charge guy and believes that everyone is working for him." (R. 400.) All of this testimony was uncontradicted.

The trial judge held that, considered in the context of the public actions which the Governor admitted, the statement that the Governor was so outraged that he called the judge could not reasonably be held to be defamatory:

> "[I]t is no more likely that the reader would regard a governor's call to a judge to complain about an unpopular and controversial decision as reflecting disgrace upon the Governor. This seems especially true where, as here, the plaintiff vigorously undertook a public course of action for which a call would be a logical (if unsuitable) culmination."

(App. 64a.)

The trial court also held that, as a matter of law, there was no malice:

> "Farrell received the information from an individual who was a highly-placed public official, personally acquainted with both Farrell and the plaintiff, and whose past honesty is unquestioned by the parties. Thus, the evidence establishes that Crane was a reliable source of information."

(App. 66a.)

The SJC reversed, holding the statement was not "opinion" and that a respectable segment of the community could distinguish between the Governor's admitted public and alleged private actions. Summary judgment was, accordingly, inappropriate because a jury should consider whether the claim about the call was defamatory. (App. 11a-15a.) The SJC also reversed the finding of no malice as a matter of law. On that issue, the SJC acknowledged that Farrell had no reason to doubt the "veracity and accuracy" of his source, the Treasurer. (App. 18a.) The Court asserted, however, that since (i) the Treasurer did not say he overheard the call, (ii) Farrell did not investigate further; and (iii) such a phone call would have been "highly unusual," a jury would be justified on these facts alone in inferring constitutional malice. (App. 17a.)[8]

Petitioners sought reconsideration of the decision. (App. 95a.) That petition was denied. (App. 104a.)

Reasons for Granting the Writ

A writ of certiorari should issue for two principal reasons, expounded below. First, this case presents issues of paramount importance — the protections for discussion of government under the First Amendment. Second, the SJC has committed serious error, in permitting an inference of malice despite the

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[8] The SJC wrote:

> It would be reasonable to infer . . . that [Farrell] knew that the conduct, if it had occurred, would have been highly unusual. Also, a jury would be warranted in finding that Farrell published the challenged statement without investigation or verification, and with the knowledge that the only information he had was hearsay, perhaps multi-level, that Crane neither disclosed his source nor vouched for his source's reliability or for the reliability of his source's source, if there was one, and that the report to Crane was as likely to have been fabrication or speculation as to have been the truth.

existence of a source whose "veracity and accuracy" the writer had no reason to doubt, thereby creating conflict with other lower court decisions.

I. Supreme Court Review is Necessary to Protect Discussion of Governmental Affairs.

The Governor saw in the article at issue assertions that he conducted "his affairs without sufficient regard for the duties and responsibilities of the office of the Governor"; that he "in character, intellect and temperment [was] unfit and incapable of performing" as governor; that he acted "without regard for the separation of powers." (Complaint, R. 14). Such claims, assuming they fairly can be read into the sentence at issue, concerning a phone call to a judge expressing privately what the Governor had already said publicly, are political charges — the types of statements candidates make about each other and citizens make about candidates. The decision below strikes at the heart of the First Amendment because the court below would make actionable a political charge. It would send to a jury for a determination of defamatory content the statement about the call because the court thought it could mean that the Governor attempted "to inferfere with the independence of the judiciary." (App. 14a.)

Certiorari should be granted because this case raises fundamental questions about the Constitutional scope of political debate and discussion of governmental activity. Suits by public officials "[lie] close to seditious libel." *Curtis Publishing Co.* v. *Butts,* 388 U.S. 130, 153 (1967) (Harlan, J.). Government action typically is discussed by discussing the actions and attitudes of government officials. That proposition was made plain by the Sedition Act, 1 Stat. 596 (1798), which sanctioned those who would "write, print, utter, or publish . . . any false, scandalous

and malicious writing . . . against . . . the President . . . with intent to defame . . . the said President or to bring [him] . . . into contempt or disrepute."[9]

Most lower courts, in the way they have applied the actual malice test and in the way they have analyzed context and defined discussion or criticism of government to be "opinion," have protected speech such as is at issue here. A conflict now clearly exists in the treatment of political speech.

Certiorari should be granted and this Court should reaffirm the promise that political speech, whether by citizens, commentators, candidates or officials, "may well include vehement, caustic and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 270 (1964). Lower courts should not be permitted to carve away protections surrounding discussion of government.

II. Lower Courts May Not Undermine Protections for Political Speech by Imposing Liability for a Failure to Investigate Where a Columnist Publishes in Reliance on a Credible Source.

A. *The Decision Below Is Inconsistent With* New York Times *and* St. Amant.

The SJC recognized that the Governor had no evidence that Farrell fabricated the statement about the call. The record also contained no evidence that Farrell had serious (or, indeed, any) doubts about the truth of his statement. Yet, purportedly

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[9] As the Court observed in *New York Times* v. *Sullivan*, 376 U.S. 254, 276 (1964), "although the Sedition Act was never tested in this Court [it expired by its terms in 1801], the attack upon its validity has carried the day in the court of history."

relying upon *St. Amant* v. *Thompson*, 390 U.S. 727 (1968), the court concluded that the record contained enough to support to "a clear and convincing degree" (App. 18a), an inference that Farrell entertained serious doubts.[10] The "evidence" can be grouped into three (although ultimately one) factors: (i) Treasurer Crane did not tell Farrell he overheard the call. Thus, Farrell relied on hearsay. (ii) Farrell did not investigate beyond the Treasurer. (iii) Such a call would have been "highly unusual" and "serious" (and therefore satisfied the *St. Amant dictum*) because Farrell had not heard of a similar incident (App. 17a). From these factors, the SJC concluded that "Farrell had obvious reasons to doubt the veracity and accuracy, not of Crane, but of Crane's undisclosed informant and any other informants in the chain of communication." (App. 18a.)[11]

The SJC's holding on malice is so wrong and would so constrict discussion of government that a grant of certiorari and summary reversal under Supreme Court Rule 23.1 is justified. It flatly is inconsistent with *New York Times* and *St.*

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[10] This case permits this Court to address the limits on *dictum* in *St. Amant*. This Court stated that malice might be found "when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation." *Id.* at 732. Since newspapers are in the business of publishing the unusual or newsworthy, presumably this Court meant something more than "unusual" by the phrase "inherently improbable." Indeed, this Court has never affirmed liability based on that language, yet lower courts have utilized the *dictum* and now it has been relied upon by the SJC. This Court should give guidance as to the scope of that *dictum* and the extent to which it survives *Bose Corp.* v. *Consumers Union of United States, Inc.*, 466 U.S. 485 (1984) (disbelief of the speaker alone cannot support a finding of malice).

[11] All three factors probably are variants of a claim of failure to investigate or question the reasonableness of the investigation. As to the first factor, the argument has to be that a writer *should* do more than rely on hearsay. Similarly, the unusual or improbable nature of a claim is significant only in the context of the investigation made. Yet, *St. Amant*, the case upon which the SJC relied, itself held that failure to investigate alone is insufficient to establish malice. 390 U.S. at 733.

Amant.[12] The mischief of the decision below is that it mutates actual malice into negligence, thus eviscerating *New York Times*. The focus becomes what a reporter *should have believed*, not what he did believe.[13] Reliance on hearsay (assum-

[12] The published advertisement in *New York Times* asserted, *inter alia*, that, "truckloads of police armed with shotguns and tear gas ringed the Alabama State College Campus." This show of force followed the singing of "My Country, 'Tis of Thee" on the state capitol steps by students and the expulsion of their leaders from school. The publication stated that the "entire student body . . . [refused] to re-register" and "their dining hall was padlocked in an attempt to starve them into submission." 376 U.S. at 257. The *Times* possessed information which disproved some of the charges. *Id.* at 263. It made no attempt to confirm the accuracy of the claims. *Id.* at 261. The case involved publication of material based on hearsay, failure to investigate, corporate knowledge to the contrary and highly unusual activity (an attempt to starve the student body). The publication in *New York Times* could not have survived the criteria articulated below.

In *St. Amant*, a political candidate accused a deputy sheriff of accepting bribes from a union official. "St. Amant had no personal knowledge of Thompson's activities, he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office who might have known the facts. He gave no consideration as to whether or not the statements defamed Thompson and went ahead heedless of the consequences. . . ." 390 U.S. at 730. The source appeared biased because he was engaged in an internal union power struggle at the time. Yet this Court concluded, "By no proper test of reckless disregard was St. Amant's broadcast a reckless publication about a public officer." *Id.* at 732. As with *New York Times*, the communication in *St. Amant* could not have survived the decision below.

See also Gertz v. *Robert Welch, Inc.*, 418 U.S. 323, 342 (1974). The article there alleged that a lawyer arranged for a police officer to be framed for murder. The publisher had done no investigation.

[13] Given the unusual nature of the sentences and their subsequent revocation by the Judge after the Governor's public actions, it is not "inherently improbable" that a call would have taken place. The Governor went on radio to say he was "concerned," he held a press conference to complain both about the sentence and the judge, he released his letters to the Chief Judge and the Judicial Conduct Commission criticizing the judge and the sentence, he offered legislation to stop a recurrence of such sentences in the future. A day after this press conference, the sentences — in another highly unusual move — were revoked *sua sponte*. Farrell's source was an ally of the Governor and a friend of Farrell with a history of veracity and accuracy. Farrell himself did

ing a writer should or could make such a distinction) may be relevant to an objective standard of care, but hardly can support an inference of belief or disbelief, particularly where the source is otherwise known to be reliable.[14] Similarly, adequacy of investigation (*i.e.*, testing) is a classic argument in product liability cases. The concept is not probative in malice cases because it is at least as easy and probably easier to infer belief from failure to investigate further as disbelief. Moreover, any doubt that a negligence-type test was intended was removed when the SJC cited its decision below in a non-public figure case. *Jones* v. *Taibbi*, 400 Mass. 786, 799-800, 512 N.E.2d 260 (1987) ("a jury could find that Channel 5 and Taibbi acted negligently in publishing their reports of Shamshak's allegations. *Cf. King* v. *Globe Newspaper Co.* . . .")

The holding below also undermines the use of summary judgment in public official cases. When can it not be argued that further investigation was warranted? Even an eyewitness can be attacked for bias or failure to perceive accurately. Contents of newspapers should not be limited by official denials. The SJC's decision would result in a jury trial in virtually every case, making this Court's decision in *Anderson* v. *Liberty Lobby*, 477 U.S. 242 (1986) (requiring libel plaintiff to meet clear and convincing evidence standard when countering summary judgment motion by defendant) meaningless.

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not treat the tip as extraordinary. He sat on it for several weeks, and then only mentioned it at the very end of a column to illustrate a point. Given the context from which Farrell viewed the situation, what evidence was there that he disbelieved the statement? Particularly in the context of political speech, the facts cry out for the appropriateness of summary judgment. There is simply *no* basis to support a jury verdict that Farrell acted with malice (or had grounds to disbelieve his source).

[14] Ironically, such hearsay could well be admissible in federal court and could be relied upon by a jury. *See* Fed.R.Evid. 803(24) and 804(5). It could also support the issuance of a search warrant. *Cf. Illinois* v. *Gates*, 462 U.S. 213, 234 (1983) ("if an unquestionably honest citizen comes forward with a report [against his penal interest] we have found rigorous scrutiny of the basis of his knowledge unnecessary").

B. *The Decision Below Creates a Conflict Among Lower Court Decisions.*

It is not surprising that this case creates a conflict among lower court decisions. For example, in *Speer* v. *Ottaway Newspapers, Inc.*, 828 F.2d 475 (8th Cir. 1987); *Grzelak* v. *Calumet Publishing Co.*, 543 F.2d 579 (7th Cir. 1975); *Curran* v. *Philadelphia Newspapers, Inc.*, 497 Pa. 163, 439 A.2d 652 (1981); *Hall* v. *Rogers*, 490 A.2d 502 (R.I. 1985); *Burns* v. *Times-Argus Ass'n, Inc.*, 139 Vt. 381, 430 A.2d 773 (1981); *Colombo* v. *Times-Argus Ass'n.*, 135 Vt. 454, 380 A.2d 80 (1977), courts held that no triable issues were raised despite failure to investigate beyond a source. Even reliance on biased sources has been held not to raise a triable issue. *E.g.*, *Hardin* v. *Santa Fe Reporter, Inc.*, 745 F.2d 1323 (10th Cir. 1984); *Loeb* v. *New Times Communication Corp.*, 497 F.Supp. 85 (S.D.N.Y. 1980); *Moriarty* v. *Lippe*, 162 Conn. 371, 294 A.2d 326 (1972); *Wanless* v. *Rothballer*, 115 Ill. 2d 158, 104 Ill. Dec. 759, 503 N.E.2d 316 (1986), *cert. denied*, ___ U.S. ___, 107 S.Ct. 3213 (1987); *Herron* v. *Tribune Publishing Co.*, 108 Wash.2d 162, 736 P.2d 249 (1987).[15]

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[15] Compare, however, *Burns* v. *McGraw-Hill Broadcasting Co.*, 659 P.2d 1351 (Colo. 1983) (reliance upon biased source plus failure to investigate); *Kuhn* v. *Tribune-Republican Publishing Co.*, 637 P.2d 315 (Colo. 1981) (no source supported the actual claim); *Akins* v. *Altus Newspapers*, 609 P.2d 1263 (Okla. 1977), *cert. denied*, 449 U.S. 1010 (1980) (kidnapping claim based on overhearing and participating in casual conversation); *Stevens* v. *Sun Publishing Co.*, 270 S.C. 65, 240 S.E.2d 812, *cert. denied*, 436 U.S. 945 (1978) (holding malice can be established based upon departure from responsible standards of investigation — articles based on unreliable source). While petitioners assert these cases are distinguishable, in each case the state court permitted trial despite assertion of a source. These inconsistencies underscore the need for further guidance from this Court.

C. *The Decision Below Will Result in Unwarranted Self-Censorship and Thus Affects More Than the Parties to This Suit.*

Certiorari should be granted not simply because the decision below is wrong and conflicts with other lower court decisions, but because its First Amendment interpretation will affect editing and publishing decisions. Because of the decision below, Massachusetts now permits an inference of malice to be drawn by a jury from a failure to investigate beyond a credible source. Media which distribute in Massachusetts, even incidentally, *see Keeton* v. *Hustler Magazine, Inc.*, 465 U.S. 770 (1984), face the chilling threat of liability for publishing information obtained from a reliable source. At the same time, other courts have found such information protected under *New York Times*. Media now face a Hobson's choice of censoring material of recognized First Amendment value in a number of jurisdictions or enduring a protracted legal action in Massachusetts. The impact on relatively small, less affluent Massachusetts publications may be particularly acute.

This case involves speech at the heart of the First Amendment, where the costs of chilling are greatest. And yet liability now may be imposed for discussion of government despite the existence of a good (indeed, governmental) source. Permitting liability in such a circumstance can only result in more self-censorship. It is intolerable that one state, with an erroneous application of a federal rule designed to prevent self-censorship, brings this very danger to pass. It is even more intolerable that a single state could obstruct the flow of core political information in the interstate media by ratcheting down the level of First Amendment protection available in its courts and, thus, inviting forum-shopping by libel plaintiffs.

III. This Court Should Hold the Statement to Be Protected Opinion Because of its Political Context.

Juries find facts; they are not to conduct plebescites on the First Amendment. Yet, that is the result of the decision below.

The Governor did not sue over a single news story. He took offense at a column which, in the context of discussing the Governor's attitude toward state officials, asserted that he called a judge to demand that a controversial decision be changed. The very reason that the SJC would let this column reach a jury is that it could be interpreted to mean the Governor "attempt[ed] to interfere with the independence of the judiciary." (App. 14a.) Comment about a governor's respect for another branch of government or actions regarding another branch lies at the heart of the First Amendment.[16] *See First National Bank of Boston* v. *Bellotti*, 435 U.S. 765, 776 (1978); *see also Philadelpia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767 (1986).[17] Claims by writers, candidates or officeholders that the chief executive infringes on the prerogatives of another

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[16] Consider: the column did not imply that the Governor somehow had a personal stake in the rape case. No Massachusetts statute or other rule prohibits a non-litigant from attempting to communicate with a judge. Massachusetts judges have virtually life tenure, Mass. Const., Part II, Ch. 3, Art. I., so that they can say "no" with impunity. *See The Federalist* No. 78, at 526 (A. Hamilton) (Heritage ed. 1945). Putting these considerations aside, the point remains that a claim of attempted "interference" with the judiciary inherently is a political criticism, *i.e.*, alleged insensitivity to constitutional demarcations.

[17] The decision below should further be reviewed for consistency with *Philadelphia Newspapers, Inc.* v. *Hepps*, 475 U.S. 767 (1986). As a public official suing a media defendant over speech on an issue of public concern, King is required by *Hepps* to prove falsity. Given the Governor's public injection of himself into and fueling of the sentencing controversy, this case squarely presents the question of whether a political discussion, "truthful" in the sense that it carries the same overall "sting" or "gist" as a literal account of events (as the trial court found), can be actionable under *Hepps* because of alleged inaccuracy in detail.

branch, even claims that he or she violates the spirit or letter of laws, are part of political debate. In his complaint, the Governor asserts that the challenged statement means that he was unfit in "character, intellect and temperment" to be governor. (Complaint, R. 14.) But that is precisely the type of a political charge that (even if it expressly were made) we are used to hearing from our citizens. It lies at the heart of the political discussion.

Courts have fashioned a variety of doctrines to protect such speech about government and governmental leaders, even when factual-sounding claims are made.[18] In this respect, the SJC's decision conflicts with other recent federal Court of Appeals and state Supreme Court cases which have found such factual-sounding statements to be constitutionally protected opinion based upon the context in which the statements were made. In *Janklow* v. *Newsweek, Inc.*, 788 F.2d 1300 (8th Cir.), *cert. denied*, ___ U.S. ___, 107 S.Ct. 272 (1986), the court held that a charge that an Attorney General was prosecuting an Indian leader for revenge was protected opinion because of the public context of the accusation. *Cf. Scott* v. *News-Herald*, 25 Ohio St. 3d 243, 496 N.E.2d 699 (1986), (claim that coach lied after giving oath to tell truth held protected opinion). By holding that a jury could find political discussion to be action-

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[18] *E.g., Letter Carriers* v. *Austin*, 418 U.S. 264 (1974) (claim that plaintiff was a "traitor" and "scab" protected); *Greenbelt Cooperative Publishing Ass'n.* v. *Bresler*, 398 U.S. 6 (1970) (term "blackmail" is opinion given context); *see also Edwards* v. *National Audubon Society*, 556 F.2d 113, 121 (2d Cir.), *cert. denied sub nom. Edwards* v. *New York Times Co.*, 434 U.S. 1002 (1977) (epithet "liar" held to be opinion); *Buckley* v. *Littell*, 539 F.2d 882, 890-92 (2d Cir. 1976), *cert. denied*, 429 U.S. 1062 (1977) (statement that plaintiff was a "fellow traveler of fascism" protected); *Sierra Breeze* v. *Superior Court*, 86 Cal.App. 3d 102, 149 Cal. Rptr. 914 (1978) (county supervisor voted "to squander property tax funds").

able, the decision below starkly contrasts with other decisions and also with our most basic traditions.

IV. Certiorari is Appropriate Now.

Given the importance of free speech and the need for clear, national rules in the First Amendment area, the remaining question is whether this Court may grant certiorari now. 28 U.S.C. § 1257 and *Cox Broadcasting Co.* v. *Cohn*, 420 U.S. 469 (1975) supply jurisdiction to hear the case now.

In *Cox Broadcasting Corp.* v. *Cohn*, this Court described four types of cases where it could grant certiorari despite the existence of further state court proceedings. Included were cases where "the federal issue has been finally decided in the state courts . . . [and] the party seeking review here might prevail on the merits on non-federal grounds, thus rendering unnecessary review of the federal issue by this Court, and where reversal of the state court on the federal issue would be preclusive of any further litigation. . . ." *Id.* at 482-83. These criteria are satisfied.

First, the federal issues have been "finally decided" by the SJC. It has held that there is sufficient basis under the facts of this case to permit a jury to find that the statement is actionable and that it was made with actual malice. Second, petitioners could prevail at trial "on non-federal grounds" if, for example, the jury concluded that the statement was not defamatory. If that happened, this Court would not be able to review the erroneous First Amendment interpretation, leaving it as the law of Massachusetts. Finally, reversal of the SJC decision would terminate lower court proceedings, and thus this Court's action at this stage would be "preclusive of any further litigation." Thus, the *Cox Broadcasting* exception is squarely met.

On the other hand, a "refusal immediately to review the state court decision might seriously erode federal policy," *Cox Broadcasting*, 420 U.S. at 483, by subjecting writers and speakers to a restrictive standard in deciding which statements to publish. The same federal policy interest supporting jurisdiction, preserving the First Amendment protections of *New York Times* and its progeny, warrants an immediate grant of certiorari.

Until reviewed by this Court, the erroneous standard established by the SJC in this case will affect editorial decisions. As long as writers are exposed to liability solely for the asserted inadequacies of their investigations, speech protected under the Constitution will be chilled. Stories for which reliable sources exist may be self-censored out of existence. As in *Cox Broadcasting*, a "failure to decide the question now will leave the press . . . operating in the shadow of the civil . . . sanctions of a rule of law . . . the constitutionality of which is in serious doubt . . ." 420 U.S. at 486. *See also Construction and General Laborers' Union* v. *Curry*, 371 U.S. 542, 550 (1963) ("postponing review would seriously erode" the federal policy at stake). First Amendment rights might irreparably be lost if the Court awaits the outcome of trial. If petitioners manage to prevail at trial, a decision threatening freedom of the press may evade this Court's review, yet remain the law into the indefinite future.

Moreover, until this Court acts, the national media face conflicting rules of conduct as to whether they may rely on credible sources for information. However this Court "were to decide on the merits, it would be intolerable to leave unanswered, under these circumstances, an important question of freedom of the press under the First Amendment; an uneasy and unsettled constitutional posture . . . could only further harm the operation of a free press." *Miami Herald Publishing Co.* v. *Tornillo*, 418 U.S. 241, 247 n.6 (1974). Immediate

review of the decision below is necessary to define and protect critically important freedoms.

Conclusion

The decision below erroneously reduces the field of political debate and discussion of governmental activities. Petitioners pray that certiorari issue.

Respectfully submitted,

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EDWARD J. KING *vs.* THE GLOBE NEWSPAPER COMPANY & others.[1]

Suffolk. February 5, 1987. — August 17, 1987.

Present: WILKINS, LIACOS, ABRAMS, NOLAN, & O'CONNOR, JJ.

Practice, Civil, Summary judgment. *Libel and Slander.*

Discussion of the propriety of a judge's considering and allowing a motion for summary judgment after another judge in the same court had denied it. [707-708]

Discussion of the distinction in the law of defamation between statements of opinion and statements of fact. [708-710]

In a civil action by a former public official against an artist and a newspaper for libel in the publication on the editorial page of three allegedly defamatory cartoons, the judge correctly ruled, in granting the defendants' motions for summary judgment, that the cartoons were expressions of opinion protected by the First Amendment to the Constitution of the United States. [710-713]

NOLAN, J., concurring in part and dissenting in part, was of opinion that summary judgment should not have been granted with respect to one of the three cartoons. [735-736]

A certain cartoon published on the editorial page of a newspaper was not actionable as libelous on the theory that it implied the existence of undisclosed defamatory facts, where the statement of opinion the cartoon conveyed was clearly based on uncontested facts published in the same newspaper the previous day. [713]

In a civil action by a former public official against a newspaper for libel in the publication of an allegedly defamatory editorial, the judge correctly granted the defendant's motion for summary judgment where the editorial, which simply posed questions and suggested answers about the way public business was being conducted, was a statement of opinion protected by the First Amendment. [713-714]

In a civil action by a former public official against a newspaper and a columnist for libel in the publication of an allegedly defamatory column on the "op-ed" page of the newspaper, the judge correctly granted the defendants' motions for summary judgment where a reasonable reader could only have understood the column as the writer's own satirical commentary on the plaintiff and his administration. [714-715]

[1] Robert L. Turner, David Farrell, and Paul Szep.

In a civil action by a former public official against a newspaper and a writer for libel in the publication of an allegedly defamatory article, the judge correctly concluded, in granting the defendants' motion for summary judgment, that, where the article suggested certain actions of the plaintiff were motivated by loyalty to an associate rather than concern for the public good, but made no implication of corruption, it was opinion protected by the First Amendment. [715-716]

The judge hearing motions for summary judgment in a libel case correctly ruled that a statement published in a newspaper article that the plaintiff, a former public official, "called a judge and demanded that he change a decision he had rendered in a gang-rape case" was unambiguously a statement of fact [716-717], but he erred in granting summary judgment for the defendants where there was a question for a jury to resolve whether those words were susceptible of defamatory meaning [717-719].

Discussion of "reckless disregard" for the truth constituting "actual malice" in the publication of a defamatory statement. [719-720]

Summary judgment in favor of a newspaper that had published a false statement of fact about a public official was not appropriate where the material before the motion judge would have warranted a jury in finding, on clear and convincing evidence, that the statement was published with the reckless disregard for its falsity thus sustaining the plaintiff's burden of proving the "actual malice" necessary for him to prevail. [720-722]

CIVIL ACTION commenced in the Superior Court Department on January 4, 1982.

The case was heard by *James P. Lynch, Jr.*, J., on a motion for summary judgment.

The Supreme Judicial Court granted a request for direct appellate review.

Robert H. Goldman (*Alan M. Cohen* with him) for the plaintiff.

Joseph L. Kociubes (*Robin A. Driskel & Don E. Gorton, III*, with him) for the defendants.

O'CONNOR, J. This is a libel action brought by former Governor of the Commonwealth Edward J. King against The Globe Newspaper Company, publisher of The Boston Globe and The Boston Sunday Globe (Globe), two Globe columnists, David Farrell and Robert L. Turner, and a Globe cartoonist, Paul Szep. The complaint is in twelve counts. In the first two counts, the plaintiff alleges that he was libeled by an article written by the defendant Farrell and published by the Globe on

November 8, 1981. Counts 3 and 4 make the same allegations with respect to an article written by Farrell and published by the Globe on November 22, 1981. Counts 5 and 6 assert that the plaintiff was libeled by a column authored by the defendant Turner and published by the Globe on January 10, 1980. Three cartoons created by the defendant Szep and an editorial accompanying one of them, appearing on various dates in the Globe, are the focus of Counts 7 through 12.

The defendants filed a motion for summary judgment. The motion was denied by a judge in the Superior Court. More than two years later, however, another judge allowed the same motion as to all counts. The second judge ruled that the cartoons and the challenged statements in all but one of the articles were constitutionally protected expressions of opinion. He concluded that the statement in Farrell's article, published on November 8, 1981, alleged by the plaintiff to be libelous, was a statement of fact rather than opinion, but that it was neither defamatory nor malicious. To be actionable, a defamatory statement of fact about a public official must have been made with malice. *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 279-280 (1964). The plaintiff appealed, and we granted his application for direct appellate review. We affirm the judgment as to all counts except Counts 1 and 2, the counts based on Farrell's November 8, 1981, article. We reverse the judgment as to Counts 1 and 2, and we remand the case to the Superior Court for trial on those counts.

We begin our review with a brief discussion of the propriety of a judge's having considered, and then allowed, the defendants' motion for summary judgment after another judge in the same court had denied it. "Though there is no duty to reconsider a case, an issue, or a question of fact or law, once decided, the power to do so remains in the court until final judgment . . . ." *Peterson* v. *Hopson*, 306 Mass. 597, 601 (1940). "A judge should hesitate to undo his own work. . . . Still more should he hesitate to undo the work of another judge. . . . But until final judgment . . . there is no lack of power, and occasionally the power may properly be exercised." (Citations omitted.) *Id.* at 603. See *Dolan* v. *Von Zweck*, 19 Mass. App. Ct.

1032, 1034 (1985), and cases cited. Noting his reluctance to entertain a motion on which another judge had previously ruled, the judge nevertheless concluded that this case presented "many compelling reasons . . . to take a 'fresh look' at certain of the issues raised." One of those reasons, sufficient by itself, is that summary judgment procedures are especially favored in defamation cases. *Godbout* v. *Cousens*, 396 Mass. 254, 258 (1985). "Allowing a trial to take place in a meritless case 'would put an unjustified and serious damper on freedom of expression.'" *Appleby* v. *Daily Hampshire Gazette*, 395 Mass. 32, 37 (1985), quoting *National Ass'n of Gov't Employees, Inc.* v. *Central Broadcasting Corp.*, 379 Mass. 220, 233 (1979), cert. denied, 446 U.S. 935 (1980). Even if a defendant in a libel case is ultimately successful at trial, the costs of litigation may induce an unnecessary and undesirable self-censorship. See *New York Times Co.* v. *Sullivan, supra* at 279. We agree with the judge that a second look at the motion for summary judgment was appropriate. This is particularly true in light of the considerable discovery that took place following the first judge's denial of the motion.

The judge allowed the defendants' motion for summary judgment with respect to Counts 3 through 12 on the ground that the cartoons and articles which those counts addressed were constitutionally protected expressions of opinion. In his thorough and scholarly memorandum of decision, the judge focused on the critical distinction in the law of defamation between statements of opinion and statements of fact. See *Cole* v. *Westinghouse Broadcasting Co.*, 386 Mass. 303, 308, cert. denied, 459 U.S. 1037 (1982). Statements of fact may expose their authors or publishers to liability for defamation, but statements of pure opinion cannot. Statements of pure opinion are constitutionally protected. *Aldoupolis* v. *Globe Newspaper Co.*, 398 Mass. 731, 733 (1986). *Pritsker* v. *Brudnoy*, 389 Mass. 776, 778 (1983). "Under the First Amendment there is no such thing as a false idea. However pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas. But there is no constitutional value in false statements of fact."

(Footnote omitted.) *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 339-340 (1974).

Of course, it is much easier to recognize the significance of the distinction between statements of opinion and statements of fact than it is to make the distinction in a particular case. "[I]t is hard to draw a bright line between 'fact' and 'opinion.'" *Janklow* v. *Newsweek, Inc.*, 788 F.2d 1300, 1302 (8th Cir.), cert. denied, 107 S. Ct. 272 (1986). Nevertheless, sensible lines must be drawn. "The determination whether a statement is a factual assertion or an opinion is a question of law if the statement unambiguously constitutes either fact or opinion." *Aldoupolis* v. *Globe Newspaper Co.*, *supra* at 733, citing *Myers* v. *Boston Magazine Co.*, 380 Mass. 336, 339 (1980). However, the determination whether a statement is a factual assertion or is a statement of pure opinion is a question of fact if the statement reasonably can be understood both ways. See *Aldoupolis, supra; Myers, supra* at 339-340. Therefore, in an action of libel, the defendant is entitled to summary judgment if the challenged statement cannot reasonably be construed as a statement of fact.

Numerous cases decided by this court and others have identified factors that tend to show whether a particular statement is one of fact or of opinion. We shall discuss some of these factors in connection with our individual treatment of the cartoons and articles in issue in this case. We note at this point, however, that the purpose for which the distinction between fact and opinion is made is of paramount importance in making the distinction. Thus, the distinction between fact and opinion in a libel case involving a public figure, as here, must reflect "a profound national commitment to the principle that debate on public issues should be uninhibited, robust and wide open, and that it may well include vehement, caustic, and sometimes unpleasantly sharp attacks on government and public officials." *New York Times Co.* v. *Sullivan, supra* at 270. Of course, the distinction must also reflect our concern for the legitimate rights of individuals to reputations unsullied by defamatory remarks. We must strive for an appropriate balance between those competing values. *Stone* v. *Essex County Newspapers*,

Inc., 367 Mass. 849, 855 (1975). *Ollman* v. *Evans*, 750 F.2d 970, 974 (D.C. Cir. 1984), cert. denied, 471 U.S. 1127 (1985). Thus, while in a criminal case the motive or intent of the defendant in performing an act is ordinarily treated as a question of fact, in a libel action a statement about a public official's motive or intent is ordinarily treated as a statement of opinion. *Janklow* v. *Newsweek, Inc., supra* at 1302, 1305.

We turn now to the specific cartoons and articles alleged to be libelous. On May 12, 1981, the Globe published a Szep cartoon, depicting the plaintiff attired in a striped suit, a black shirt, and a white necktie on which the words "Can Do" appear. The plaintiff is holding a hat with an attached pinwheel, and he is handcuffed to a police officer who is reading to another officer seated at a desk an apparent list of the plaintiff's appointees. The following words appear beneath the cartoon: "the appointment and forced resignation of Stephen Guptill, the appointment and forced resignation of Stephen Clifford, the appointment and forced resignation of Thomas DiSilva, the appointment and forced resignation of John Haggerty, the appointment and forced resignation of Barry Locke . . . ." A copy of this cartoon appears as Appendix A to this opinion. In determining whether a statement can reasonably be construed as a statement of fact, it is appropriate to consider "the medium by which the statement is disseminated." *Cole* v. *Westinghouse Broadcasting Co., supra* at 309, quoting *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980). "Cartoons are seldom vehicles by which facts are reported; quite the contrary, they are deliberate departures from reality designed forcefully, and sometimes viciously, to express opinion." *Keller* v. *Miami Herald Publishing Co.*, 778 F.2d 711, 718 (11th Cir. 1985). Reasonable readers are well aware that "[c]artoonists employ hyperbole, exaggeration, and caricature to communicate their messages . . . ." *Id.* at 716. See also *Yorty* v. *Chandler*, 13 Cal. App. 3d 467, 471-472, 474 (1970).

The plaintiff contends that the "appointments" cartoon makes a statement that he appointed individuals to government positions whom he knew at the time of appointment to have engaged

in unethical or criminal conduct, and that the plaintiff had a criminally culpable state of mind. However, we agree with the judge that the cartoon unambiguously is a statement of the cartoonist's opinion, expressed by the use of "artistic rhetorical hyperbole," that the plaintiff was responsible for several ill-advised appointments. As the judge observed, it would be unreasonable to interpret that cartoon as a disclosure that "the plaintiff had been arrested, handcuffed, and charged, or was a criminal, or knew of criminal or unethical conduct of his appointees before their selection."

Another Szep cartoon, published November 9, 1979, is entitled "King Signs School Prayer Bill," and depicts the plaintiff at a desk signing a piece of paper, presumably the school prayer bill. He is flanked on one side by a person named "Patronage" and on the other side by a person named "Cronyism." "Patronage" carries in his pocket a satchel labeled "Pay Raise," and "Cronyism" holds the plaintiff's arm as the plaintiff signs the paper. Packets of money are on the desk in front of "Cronyism." The caption to the cartoon is "So Let Us Prey!" A copy of the cartoon appears at the end of this opinion as Appendix B.

As we observed in connection with the "appointments" cartoon, cartoons are seldom designed to disclose facts, but rather are ordinarily understood by reasonable viewers to be rhetorical, exaggerated means of expressing opinions. The plaintiff argues in reference to the "School Prayer Bill" cartoon that "an inference exists that the packets of money on the table that 'Cronyism' is holding relate not to the Pay Raise Bill but to monetary payments Plaintiff allegedly received or was to receive for signing the School Prayer Bill. The linked arms of 'Cronyism' and Plaintiff can only indicate a direct or indirect correlation between the money on the table and Plaintiff's signing of the School Prayer Bill. The 'So Let Us Prey!' caption clearly implies that Plaintiff was preying on the public by enacting legislation in exchange for monetary compensation." We are not persuaded by the plaintiff's argument. In our view, the interpretation of the cartoon advanced by the plaintiff is unreasonably strained. Statements alleged to be libelous must

be interpreted reasonably. *Lyons* v. *New Mass Media, Inc.*, 390 Mass. 51, 60 (1983). The cartoon in question cannot reasonably be construed as representing as a fact that the plaintiff had been guilty of extortion or had accepted a bribe to sign the school prayer bill. At the most, the cartoon may suggest that the plaintiff was motivated to sign the school prayer bill by his interest in attracting legislative support for the pay raise bill, which, in the cartoonist's view, constituted preying on the public. But, the First Amendment protects the questioning and impugning of the motives of public officials. See *Janklow* v. *Newsweek, Inc.*, *supra* at 1305 ("It is vital to our form of government that press and citizens alike be free to discuss and, if they see fit, impugn the motives of public officials").

The final cartoon of which the plaintiff complains was a Szep cartoon published by the Globe on October 18, 1979. On the previous day, the Globe had published an article prepared by its Spotlight Team of investigative reporters detailing efforts by Secretary of Transportation Barry Locke to protect and preserve certain billboards slated for removal. The article, not challenged here, also reported that industry officials, friends, and relatives had contributed to the plaintiff's 1978 gubernatorial election campaign. On October 18, the Szep cartoon was published alongside an editorial. The editorial expressly relied on and drew from the article of the previous day. The cartoon depicts a billboard on which caricatures of the plaintiff and Locke, holding bags of money, appear. At the base of the billboard is the name "Ackerley," and the billboard says, "Ackerley Billboards can put money in your pockets too!" Copies of this cartoon and the accompanying editorial appear as Appendices C and D to this opinion. The editorial suggests that the resurgence of the billboard industry was due to the fact that "industry money finally reached what must be the right places." The editorial asserts that persons associated with "Ackerley Communications, one of the nation's largest billboard firms . . . dropped $7000 into [the plaintiff's] campaign treasury" and that, subsequently, the plaintiff's administration took several actions favorable to the billboard industry.

The billboard cartoon must be viewed as a protected expression of opinion. We do not agree with the plaintiff that the cartoon depicts him "accepting cash bribes . . . in return for his support of the efforts of Ackerley Communications." Rather, we agree with the judge that "[t]he alleged facts figuratively conveyed by the cartoon (that the plaintiff and Locke received personal cash contributions and/or payoffs from Ackerley) simply do not flow from a form of expression that clearly draws upon overstatement and extravagant symbolism to make its point. The cartoon implies nothing more than Szep's editorial judgment that the plaintiff's association with Ackerley raised questions of public concern."

A statement cast in the form of an opinion may imply the existence of undisclosed defamatory facts on which the opinion purports to be based, and thus may be actionable. See *Aldoupolis* v. *Globe Newspaper Co., supra* at 735; *Fleming* v. *Benzaquin*, 390 Mass. 175, 187 (1983); *Cole* v. *Westinghouse Broadcasting Co., supra* at 312-313; *Myers* v. *Boston Magazine Co., supra* at 338-339; *National Ass'n of Gov't Employees, Inc.* v. *Central Broadcasting Corp., supra* at 227-228; Restatement (Second) of Torts § 566 (1977). But, the billboard cartoon does not imply the existence of undisclosed facts. On the contrary, the cartoon was clearly based on the facts disclosed in the report that had been published the previous day, which are not contested here.

The statements contained in the editorial accompanying the billboard cartoon also fall within the ambit of protected opinion. The primary theme of the editorial is a condemnation of the billboard industry's actions, objectives, and lobbying practices. The plaintiff focuses especially on the statement appearing in the editorial's fourth paragraph that says that "apparently . . . industry money finally reached what must be the right places." The plaintiff contends that the editorial accuses him of corruptly furthering the industry's interests in exchange for campaign contributions. The word "apparently" makes clear that the author of the statement is indulging in speculation, or at most, deduction. Moreover, the editorial spells out the reasons why that deduction was made: (1) money associated with the

billboard industry was contributed to the plaintiff's gubernatorial campaign, and (2) public opinion and the public interest were opposed to favorable treatment for the industry, so some other reason for its resurgence must be supposed. The editorial simply posed questions and suggested answers, as a matter of opinion, about the way public business was being conducted. The First Amendment protects such discussion.

On January 10, 1980, the Globe published on its op-ed page a column authored by the defendant Robert L. Turner. A copy of the column appears as Appendix E following this opinion. The entire column, labeled "Political Circuit By Robert L. Turner," consists of a fictitious press release purporting to have been issued by the plaintiff. It introduces the release with the words, "~~Following is a~~ statement from Gov. Edward J. King on the departure of his press secretary, Ronald C. Brinn." Construed literally, the "Press Release" column falsely attributes to the plaintiff various statements which may have discredited him. Such false attribution can be defamatory. See *Schrottman* v. *Barnicle*, 386 Mass. 627, 641 (1982). However, just as we held in *Myers* v. *Boston Magazine Co.*, 380 Mass. 336 (1980), that, read in context, the statement that a sportscaster "is enrolled in a course for remedial speaking" could not reasonably be interpreted in a literal sense, so too, a literal construction of the "press release" as originating with the plaintiff would have been unreasonable. A reasonable reader could only have understood the column as Turner's own commentary on the plaintiff and his administration.

Reasonable readers "expect to read columnists' views and opinions as opposed to factual news stories" on an op-ed page. *Aldoupolis* v. *Globe Newspaper Co.*, 398 Mass. 731, 734 (1986). Furthermore, the entire column, appearing under Turner's name, consisted of the fictitious press release. Clearly, Turner was employing the plaintiff's "voice" as a device to convey his own ideas. It might have been different if the column presented the press release and then proceeded to analyze and comment on it. Also, as in *Myers*, *supra* at 342, the "press release" contains numerous obvious attempts at humor, which one would not expect to find in an authentic

press release. The release purports to concern the departure of the plaintiff's press secretary. It begins with the words, "Good riddance," and proceeds to blame on the press secretary mishaps and misunderstandings that Turner obviously believed to be flaws in the plaintiff's performance. The press secretary is referred to as "the hard-boiled grinch who told me to cut off funds to the Pine Street Inn a week before Christmas." The release also declares in obvious tongue-in-cheek fashion that, if the press secretary was poorly informed about the plaintiff's administration, it was not the plaintiff's fault because the plaintiff "told him to read the papers. Somebody in this administration ought to read the papers." The column concludes with the italicized proposal, "For a recorded actuality of Gov. Edward J. King reading this press release, call 'Dial-a-Governor' — 1-800-632-8222." We are satisfied that a reasonable reader would have recognized Turner's column as satire. Contrary to the plaintiff's contention, no cautionary words to that effect were necessary. See, regarding the use of cautionary words, *Aldoupolis* v. *Globe Newspaper Co., supra.*

On November 22, 1981, the Globe published an article written by the defendant Farrell. The article is reproduced in Appendix F. The article focuses primarily on one David Thissen and his relationship with various public figures, and it discusses the fact that the plaintiff remained loyal to the controversial Thissen despite possible adverse political consequences. In the eighth of the article's seventeen paragraphs, the Farrell article states: "The Governor has never run away from Thissen even in the face of strong recommendations by Hanley et al that he would be better off putting some distance between himself and Thissen. This personal loyalty King manifests towards associates never was more apparent than during the recent infighting over a satisfactory racing bill for the industry. Despite his close association with out-of-state dog racing promoter Eddie Keelan, King has made no secret of his efforts to do Keelan's bidding on the legislation that would greatly benefit the harness track at Foxborough owned by Keelan and his partners."

There is no disagreement that the legislation to which the article refers is a racing bill which passed the Legislature in the fall of 1981, but which the plaintiff as Governor refused to sign without amendments. Also, it appears to be undisputed that the bill gave the Raynham dog track additional racing dates which competed with the schedule of Keelan's harness race track at Foxborough, and that the plaintiff predicated his approval of the bill on three amendments, one of which would have aided the track at Foxborough by preserving certain dates free of competition from the nearby Raynham and Taunton tracks.

The plaintiff's challenge to the article focuses upon the statement that he did Keelan's "bidding" in connection with the racetrack legislation. Reasonably interpreted, that statement may assert that the position the plaintiff took on that legislation was motivated by loyalty to Keelan, and perhaps by self-interest, rather than by concern for the public good. But, as the judge concluded, and as we said regarding the school prayer cartoon, *supra* at 712, the First Amendment protects as opinion discussion about the motives of public officials. The article does not imply that the plaintiff acted pursuant to a corrupt scheme to obtain personal benefits in exchange for political favors. The article suggests that the plaintiff may have been too tightly bound by personal loyalties, but it makes no implication of corruption.

Finally, we come to the Farrell article published on November 8, 1981, a copy of which appears as Appendix G herein. This article is the subject of the first two counts in the plaintiff's complaint. It is entitled "Ed King's promises not money in bank." The last two paragraphs of the article are as follows: "It has taken some political figures a long time to realize that King operates on a one-way street and regards all other state officials — duly elected constitutional officers, elected legislators, judges and other members of the judiciary — as subordinates of the executive, with their principal function to serve him, the master.

"That condescending attitude never was more in evidence than in October when King called a judge and demanded that

he change a decision he had rendered in a gang-rape case. The judge acquiesced and proved two things: (1) King's original appointment of him was a colossal blunder. (2) He is unfit to remain on the bench."

In the case to which the article referred, five men had pleaded guilty to charges of rape, unnatural rape, and malicious destruction of property, and they had been sentenced. The plaintiff publicly and repeatedly expressed his disapproval of the sentences imposed. He released copies of critical letters he had written to the Administrative Justice of the Superior Court and to the Judicial Conduct Commission. However, for purposes of the summary judgment motion the defendants concede that the plaintiff did not call the sentencing judge.

We agree with the plaintiff, as did the motion judge, that the statement that the plaintiff "called a judge and demanded that he change a decision he had rendered in a gang-rape case" was unambiguously a statement of fact. This was a statement that a specific, verifiable event had occurred. There was neither imprecision in meaning nor anything in the context of the article that suggested that the statement was not factual. Indeed, the statement, in context, functions as factual support for the author's critical characterization of the plaintiff's attitude toward other State officials. These are factors that we have previously recognized as tending to establish a statement as one of fact rather than of opinion for First Amendment purposes. See *Aldoupolis* v. *Globe Newspaper Co.*, *supra* at 733-734; *Fleming* v. *Benzaquin*, 390 Mass. 175, 180-181 (1983); *Lyons* v. *New Mass Media, Inc.*, 390 Mass. 51, 60 (1983); *National Ass'n of Gov't Employees, Inc.* v. *Central Broadcasting Corp.*, 379 Mass. 220, 228-229 (1979). Thus, the defendants are not entitled to summary judgment on the ground that the allegedly libelous statement was a statement of constitutionally protected pure opinion.

We proceed, then, to a consideration whether, for summary judgment purposes, the statement in question was nondefamatory, as the judge concluded. "Words may be libellous unless they 'cannot be reasonably understood in a defamatory sense, or, to express it in another way, unless they are incapable of

a defamatory meaning. The test is whether, in the circumstances, the writing discredits the plaintiff in the minds of any considerable and respectable class of the community.'" *Smith* v. *Suburban Restaurants, Inc.*, 374 Mass. 528, 529 (1978), quoting *Muchnick* v. *Post Publishing Co.*, 332 Mass. 304, 305-306 (1955). "If a publication is susceptible of both defamatory and harmless meanings, it presents a question for the trier of fact and cannot be ruled non-libellous as matter of law. . . . Inferences which might be drawn by a considerable and respectable segment of the community can make a publication actionable. . . . Words may be actionable even if they do not tend to damage a plaintiff's reputation or hold him up to ridicule in the community at large or among all reasonable people; it is enough to do so among a considerable and respectable class of people. . . ." (Citations omitted.) *Id.* at 530. See also *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 853 (1975).

In concluding that the challenged statement was not susceptible of defamatory meaning, the judge reasoned that *an average reader* would not "judiciously distinguish between the numerous, highly visible actions taken by the plaintiff and the single action falsely attributed to him," and that an average reader would not regard such a telephone call "to complain about an unpopular and controversial decision as reflecting disgrace upon the governor . . . especially . . . where, as here, the plaintiff vigorously undertook a public course of action for which such a call would be a logical (if unsuitable) culmination."

In our view, Farrell's statement that the plaintiff "called a judge and demanded that he change a decision he had rendered in a gang-rape case" was susceptible of a defamatory meaning. A jury would be warranted in finding that, although the general public was unhappy with the judge's decision, a considerable and respectable segment of the community would "judiciously distinguish" between the plaintiff's vigorous and public disagreement with the decision, on the one hand, and the plaintiff's attempt to interfere with the independence of the judiciary, on the other. Furthermore, in light of the fact that the independence

of the judiciary is the cornerstone of a society governed by law, it would not be unreasonable for a jury to conclude that the plaintiff would be discredited in the eyes of that same segment of the community as a result of the false disclosure that he had misused the power of his office in an attempt to pressure the judge to change his decision.

Our final inquiry with respect to Farrell's November 8, 1981, article is whether summary judgment for the defendants is nevertheless appropriate because there is no genuine issue concerning Farrell's "actual malice" in making the statement in question. The plaintiff, as a public figure, cannot recover damages without proving "actual malice." *New York Times Co.* v. *Sullivan*, 376 U.S. 254, 283 (1964). Actual malice is proved "by a showing that the defamatory falsehood was published with knowledge that it was false or reckless disregard of whether it was false." *Stone* v. *Essex County Newspapers, Inc., supra* at 867, citing *New York Times Co.* v. *Sullivan, supra* at 279-280.

In *Celotex Corp.* v. *Catrett*, 106 S. Ct. 2548, 2552-2555 (1986), the Supreme Court held that, under Fed. R. Civ. P. 56 (c), when a party not having the burden of proof at trial demonstrates that the party having that burden has insufficient evidence to sustain it, the moving party is entitled to summary judgment. As the Court observed, "[o]ne of the principal purposes of the summary judgment rule is to isolate and dispose of factually unsupported claims or defenses." *Id.* at 2553. Even applying the *Celotex Corp.* standard, which we are not bound to do, we are satisfied that the material before the judge demonstrates the availability of clear and convincing evidence of Farrell's reckless disregard for the truth. See *Anderson* v. *Liberty Lobby*, 106 S. Ct. 2505, 2512 (1986); *National Ass'n of Gov't Employees, Inc.* v. *Central Broadcasting Corp.*, 379 Mass. 220, 231 (1979).

The test to determine "reckless disregard" is entirely subjective. *Stone* v. *Essex County Newspapers, Inc., supra* at 867. The Supreme Court has spoken of reckless disregard of the falsity of a defamatory statement as "subjective awareness of probable falsity" (*Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323,

335 n.6 [1974]); "high degree of awareness of . . . probable falsity" (*Garrison* v. *Louisiana*, 379 U.S. 64, 74 [1964]), and "awareness of probable falsity" (*Curtis Publishing Co.* v. *Butts*, 388 U.S. 130, 153 [1967]). The Supreme Court has also said that, to raise the question whether a defendant published a defamatory statement with reckless disregard for its falsity, "[t]here must be sufficient evidence to permit the conclusion that the defendant in fact entertained serious doubts as to the truth of his publication. Publishing with such doubts shows reckless disregard for truth or falsity and demonstrates actual malice." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). In *Bose Corp.* v. *Consumers Union of U.S., Inc.*, 466 U.S. 485, 511 n.30 (1984), the Supreme Court, citing *New York Times Co.* v. *Sullivan, supra; Gertz* v. *Robert Welch, Inc., supra,* and *St. Amant* v. *Thompson, supra*, again defined actual malice as publication despite serious doubt of the truth of the publication. See also *Herbert* v. *Lando*, 441 U.S. 153, 156 (1979), quoting *St. Amant* v. *Thompson, supra* at 731. This court, too, has quoted *St. Amant* in describing reckless disregard for truth or falsity as "serious doubts as to the truth" of the publication. See *Stone* v. *Essex County Newspapers, Inc., supra* at 867; *Twohig* v. *Boston Herald-Traveler Corp.*, 362 Mass. 807, 810 (1973). We apply that standard here.

As we observed in *Stone, supra* at 867-868, a jury may find that the author of a statement entertained serious doubts about the truth of his or her statement "on the basis of an inference drawn from objective evidence, since it would perhaps be rare for a defendant in such a circumstance to admit to having had serious, unresolved doubts." We must review, then, the materials put before the judge to determine whether, "considered with an indulgence in the plaintiff's favor," they may demonstrate to a jury to a clear and convincing degree the presence of malice on Farrell's part. *Godbout* v. *Cousens, supra* at 258-259. See *Anderson* v. *Liberty Lobby, Inc.*, 106 S. Ct. 2505, 2513 (1986).

Our review focuses on the deposition testimony of Farrell and Crane. Farrell testified that State Treasurer Robert Crane was his source, and his only source, for stating that the plaintiff

had called the judge who had presided over the rape trial and demanded that the judge change his decision. Crane testified that, during a luncheon conversation, he had told Farrell that it was Crane's "understanding that the Governor was upset and called the judge, raised hell about it, said it was a lousy decision, and it should be changed." After testifying that he was unable to recall "the language [he] used to Mr. Farrell," Crane was asked, "Now, you said that you told Mr. Farrell that you had heard that Governor King had telephoned [the judge]? Did I understand you correctly?" Crane's answer was, "You did." That evidence would warrant findings that Farrell knew that Crane was not purporting to have personally witnessed the reported conversation, and that he was only repeating what he had been told. From what Crane did not say as well as from what he said, a jury also would be warranted in finding that Crane's statement to Farrell suggested that Crane's source was neither the plaintiff nor the judge.

Crane testified that, when he spoke to Farrell, Crane did not know who his informant had been, and that, at the time he testified, he did not know the informant's identity. Farrell's testimony was that he never asked Crane who Crane's informant had been, that Crane never told him, that Farrell never spoke to the judge to verify the information, and that Farrell never asked anyone else to do so. Farrell also testified that, in his thirty-five years of journalistic experience he had never heard of a similar occurrence, and that he would regard as "serious" a chief executive's demanding that a judge change a decision in a criminal case.

It would be reasonable to infer from the deposition testimony that Farrell, an experienced journalist, published as a fact that the plaintiff had engaged in conduct which, if known, would discredit him in the eyes of a considerable and respectable segment of the community, that Farrell knew that his statement was likely to have that effect, and that he knew that the conduct, if it had occurred, would have been highly unusual. Also, a jury would be warranted in finding that Farrell published the challenged statement without investigation or verification, and with the knowledge that the only information he had was hear-

say, perhaps multi-level, that Crane neither disclosed his source nor vouched for his source's reliability or for the reliability of his source's source, if there was one, and that the report to Crane was as likely to have been fabrication or speculation as to have been the truth.

The Supreme Court has said: "The defendant in a defamation action brought by a public official cannot . . . automatically insure a favorable verdict by testifying that he published with a belief that the statements were true. The finder of fact must determine whether the publication was indeed made in good faith. Professions of good faith will be unlikely to prove persuasive, for example, where a story is fabricated by the defendant, is the product of his imagination, or is based wholly on an unverified anonymous telephone call. Nor will they be likely to prevail when the publisher's allegations are so inherently improbable that only a reckless man would have put them in circulation. Likewise, recklessness may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his reports" (footnote omitted). *St. Amant* v. *Thompson, supra* at 732. Here, Farrell had obvious reasons to doubt the veracity and accuracy, not of Crane, but of Crane's undisclosed informant and any other informants in the chain of communication. We are satisfied that the evidence we have discussed would warrant a jury's finding of actual malice by clear and convincing evidence.

The judgment with respect to Counts 3 through 12 is affirmed. The judgment as to Counts 1 and 2 is reversed, and the case is remanded to the Superior Court for trial.

So ordered.

APPENDIX A.

"... the appointment and forced resignation of Stephen Luptak, the appointment and forced resignation of Stephen Clifford, the appointment and forced resignation of Thomas DeSilva, the appointment and forced resignation of John Haggerty, the appointment and forced resignation of Barry Locke ..."

BEST AVAILABLE COPY

APPENDIX B.

BEST AVAILA

APPENDIX C.

ABLE COPY

APPENDIX D.

The old billboard game

Sooner or later, there just had to be the sniff of a billboard scandal. And now there is one and it brings back those good old days when the lobbyist was king and there were always goodies for his pals in the Legislature.

During 10 years that may someday be labeled Massachusetts' "good government decade," the billboard industry has been on the run. Local communities that decided they'd been captive long enough to 672 square-foot huckstering found that state agencies and the courts were backing them up when they moved to get offending signs removed. Some legislators even discovered they could get along without a free lunch or a free billboard just before election time.

It was not that the billboard industry had folded up its barker's stand; it fought every attempt to regulate its excesses and spent a lot of money on lawyers and lobbyists. Yet, while there are still some 1000 billboards standing in violation of local, state, or federal regulations, they have been coming down from the places where people did not want them.

But now, in the space of barely a year, the tide has turned — not because people and local officials got up and objected, demanding that the billboards be put back up, but apparently, as The Globe's Spotlight Team has detailed, because industry money finally reached what must be the right places.

One year ago last August the locally-owned Donnelly Advertising Co., the state's major billboard advertising firm, was bought out for $9 million by Ackerley Communications, one of the nation's largest billboard firms. Ackerley signed up former House Speaker Robert H. Quinn to do its lobbying at the State House. Then, just before the September primary, seven of its executives (and their friends and relatives) discovered Edward J. King, at the time just an underdog candidate for governor, and dropped $7000 into his campaign treasury.

And back out of the Beacon Hill closet come all the old games. A bill zips through the Legislature and into law with King's signature to allow a ski resort billboard to remain despite a court order. King's transportation secretary and close adviser Barry Locke moves to block the removal of 95 billboards that violate the federal highway beautification law. And to top it off — for now, anyway — the administration starts talking about weakening the powers of the watchdog Outdoor Advertising Board.

Meanwhile, the industry is apparently posting or enlarging signs without permits, and providing free billboard space — either knowingly or by a very expensive oversight — to Boston mayoral candidate David Finnegan who just happens to be brother of the House Ways and Means chairman.

And why? Because billboard advertising is a big bucks industry but, curiously, an industry with not much of a constituency and, despite the piteous claims of its State House supporters, with no more than 400 employees at present, according to an industry source.

Those factors prompted the billboard industry to act as it did in the past and the way it apparently will continue to operate until it can be compelled to obey the wishes of local communities and the standards set by local, state, and federal regulations. It will be a hard game to win in a tough league, but the victory will be worth it.

APPENDIX E.

There's a new 'can-do' man in charge

NEWS RELEASE
To: The State House press
Date: Jan. 9, 1980
From: Gov. Edward J. King
Contact: Gov. Edward J. King

Following is a statement from Gov. Edward J. King on the departure of his press secretary, Ronald C. Brinn.

"Good riddance.

"With Ron Brinn out of the administration, the big roadblock is removed. Now I'll be able to get my message out to the people and pal around with reporters the way I tried to all last year. But Ron kept getting in the way.

"Clearly, I could have made the $500 million property tax rollback if Ron had only performed up to par. And talk about patronage! Ron was the one who insisted that I hire Guptill and Clifford and Haggerty and DiSilva and Foster. And now the MBTA's a big headache and Ron's no help — he's a Navy man.

"Ron, in fact, was the hard-boiled grinch who told me to cut off funds to the Pine Street Inn a week before Christmas.

"Clearly, we don't have to look very far to find out why my ratings have been plummeting in the polls. The substance has been terrific; Ron just didn't communicate the image.

"And let's not have any more talk about poor communication between Ron and me, either. It was Ron who insisted last spring that he move his offices down to the nether reaches of the State House — about three bus stops and an elevator ride from me. Ron felt he had been getting too close.

"If Ron wasn't well informed about administration activities, it's not my fault. I told him to read the papers. Somebody in this administration ought to read the papers.

"While we're on bad communications, let's get one thing straight. For all his faults, I didn't fire Ron, or even 'displace' him, as he said. I offered him a perfectly good job handing out press releases in the Saltonstall Building someplace.

"All these months, I've been dying to get friendly with the press, but Ron kept shouldering me aside, wanting the spotlight for himself.

"And people got the wrong idea. When Ron jumped out there to deal with the Guptill and Clifford firings and to face the demonstration of shouting welfare mothers, people thought I was cowering in my office and had fed Ron to the wolves. Actually I was champing at the bit to demonstrate my 'can-do' approach to problem-solving.

"For the sake of accuracy, I must reveal this: Ron is the one with the taste for lobster salad — and tail meat only, please. The Globe smeared me terribly with that picture of a nice, big lobster on Page One. I wanted to talk to the public, to tell the taxpayers the truth — that when they paid $260 for dinner for me and a trooper and Tommy McGee and his wife and his son, it wasn't lobster at all. It was only cold cuts that cost $52 per person.

"I should have learned my lesson early. Marty Burke, my press secretary during the campaign, seemed to be working out until he actually started talking to reporters. Naturally, I had to get rid of him. I tried to set both Marty and Ron straight by embarrassing them in public, but it didn't work.

"Ron turned out to be a big mistake. When I brought him over from MassPort, the most he'd ever done was coordinate press activities at Logan Airport when a DC-9 smashed into the sea wall there. He'd never worked a real disaster.

"Now things will be different. From now on, Ed King will have the best PR man in the business: Ed King."

For a recorded actuality of Gov. Edward J. King reading this press release, call "Dial-a-Governor" — 1-800-632-8222.

Robert L. Turner is a Globe political columnist.

APPENDIX F.

MISSING VIP

David Farrell

When the S.S. Volendam sailed from Commonwealth Pier on Gov. Edward J. King's "Cruise To Nowhere" fundraiser a fortnight ago, there was one VIP missing from the passenger list. David R. (Dick) Thissen, controversial head of the Desmond & Lord architectural firm, which ran aground during a long investigation by the Special Commission on State and County Buildings last year, passed up the opportunity to spend the night in Massachusetts Bay with King, his longtime friend, business partner and vacation companion.

Under normal conditions, Thissen would have been aboard the liner during the all-night bash, which cost contributors to the governor's re-election campaign $200.

But these are not usual times for Thissen, whose hard-pressed firm merged with John Carl Warnecke & Associates two years ago when it became apparent that the probe of Desmond & Lord by the Ward commission was having a devastating effect on D & L's ability to attract new architectural business in this area. Thissen and the new firm's owner, John Carl Warnecke, have collaborated on several architectural jobs awarded Thissen's old firm during the past two decades.

The personable Thissen, once highly visible, has become a political recluse of sorts and is avoiding the spotlight as much as possible. He still swims at the University Club but is seldom seen at many of the haunts he used to frequent.

It wasn't long ago that he and the governor dined on a regular basis at various restaurants in the metropolitan area. But all that has changed because of the adverse impact the Ward commission notoriety has had on Thissen ability's [sic] to generate business for the Warnecke firm.

Except for an occasional fundraiser or wedding reception, the two friends rarely get together, as they once did, at such popular restaurants as Anthony's Pier 4 and Jimmy's Harborside. The last time this occurred was about 10 weeks ago when Secretary of Administration and Finance Edward Hanley invited Thissen to the wedding reception for one of his daughters at Pier 4. That, in itself, was surprising since Hanley has never associated with or been an admirer of Thissen. Hanley privately places much of the blame for the deterioration of King's public image on Thissen.

The governor has never run away from Thissen, even in the face of strong recommendations by Hanley et al that he would be better off putting some distance between himself and Thissen. This personal loyalty King manifests towards associates never was more apparent than during the recent in-fighting over a satisfactory racing bill for the industry. Despite his close associ-

ation with out-of-state dog racing promoter Eddie Keelan, King has made no secret of his efforts to do Keelan's bidding on the legislation that would greatly benefit the harness track at Foxborough owned by Keelan and his partners.

King still slips out of town with Thissen. They went to Saratoga for the races last August as they do every summer. Over the Easter holidays last spring, they were at the races in Florida. And this Christmas, as they do every Christmas, they are expected to be together in Miami for the winter racing season.

Thissen's pass-up of King's invitation to join him at the Miami Dolphins-Patriots football game here two Sundays ago is indicative of Thissen's plan to make himself more scarce as the 1982 gubernatorial campaign builds.

He is a very close friend and golfing partner of US House Speaker Thomas P. (Tip) O'Neill Jr., a fact which puts him in an embarrassing middle as the upcoming battle by Lt. Gov. Thomas P. O'Neill 3d to wrest the governorship from King intensifies. Over the three decades since the elder O'Neill was speaker of the Massachusetts House, Thissen has been an intimate.

What makes the situation difficult for Thissen is that O'Neill's son, the lieutenant governor, has been attacking King (and former Gov. Michael S. Dukakis) with increasing tempo of late. As a result, Thissen, who has been a most generous campaign donor to the governor and both O'Neills, will have to sit out the 1982 battle and content himself with giving them equal contributions.

Dukakis, meanwhile, is planning to make the close relationship between King and Thissen part of his own campaign for another term. The ex-governor's campaign strategists are also assuming that the Thissen association with the O'Neill family will not be overlooked by the electorate.

Dukakis is expected to focus on the King-Thissen links, particularly their efforts to undermine and thwart the work of the Ward commission in 1979 and 1980.

Thissen and King still maintain close busines relationships. They are in the coal business with Red Sox players Carl Yastrzemski and Dwight Evans. The four have invested some $300,000, according to Yastrzemski, in a West Virginia coal mine which has not done well. They recently replaced the general manager of coal operations in an effort to get more production and profits.

On the side, Thissen, who always has had a sharp eye for good investments, continues to develop other relationships with men such as Bruins' president Paul Mooney.

Still unresolved and ahead of him is the allegation by the Ward commission that his former firm illegally contributed $1100 to Gov. King's 1978 campaign through a Desmond & Lord secretary. The commission referred that matter to Atty. Gen. Francis X. Bellotti, who is expected to make a decision on it soon.

David Farrell is a Globe political columnist.

APPENDIX G.

Ed King's promises not money in bank

David Farrell

After the controversial Primary Source liquor bill squeaked through the House and Senate at the end of October, chain store owner Freddy Martignetti breathed a sigh of relief. All that he needed was the signature of Gov. Edward J. King.

Martignetti and the governor had discussed the bill and Martignetti's industry problems on several occasions during recent years. And he had King's word that he would sign the measure. That was like having money in the bank.

Martignetti and King had been good friends since their BC High days when Freddy and twin brother Joe met King. The Freddy Martignettis and the Kings socialized over the years, at house parties and other get-togethers. The athletic prowess of the Martignetti children was another bond with the governor, who is well known for his partiality to and idolization of athletes. Most recently, King and Freddy spent considerable time together at the wedding and reception for one of the Martignetti children several weeks ago.

Now for the first time in seven years, Freddy Martignetti could see some daylight in his long battle with the State Alcoholic Beverages Control Commission (ABCC) and the courts over the number of package stores he may legally operate.

Bill's opponents knew their man

The 56-year-old Martignetti knew that the commission decisions which mandated him to get rid of some of his stores because he violated the spirit of the three-store statute would stand, no matter what happened to the Primary Source bill.

But enactment and signing of the measure, whose main provision would bar retail outlets from dealing with out-of-state wholesalers, also would mean that the three-license limit would be scrapped and raised to a seven-license plateau. Martignetti thus would be able to reshuffle his empire and get his business back to the successful peak it enjoyed before the ABCC moved against him.

But while Martignetti, Bruce Wright, Sam Stone and other proponents of Primary Source were laboring so diligently to get the legislation through the House and Senate, opponents, led by Whitehall's Marvin Gordon, came up with a clever strategy that would have appeal only to a governor of King's peculiar makeup.

King was being pressured by public interest groups and some of his own advisers to sign the bottle bill that was so strongly opposed by all liquor interests, Martignetti included, on both sides of the Primary Source controversy. To make it appear that he was seriously weighing the merits of

the bottle bill, King even went to Michigan to review that state's excellent experience with its bottle law.

Since Primary Source had been painted by its opponents as an anti-consumer bill which would hike the price of liquor in Massachusetts and send consumers here to New Hampshire liquor stores, why not blunt the anticipated consumer outrage over a bottle bill veto with a veto of Primary Source? King was asked.

The governor, who had teased the public all summer with his well-orchestrated charade about "rethinking" his previous stand against the bottle bill, jumped at the inviting prospect of mitigating the public outcry against his rejection of the anti-litter legislation with his pitch to the consumer on Primary Source.

It didn't matter to King that the liquor legislation was fashioned by his own special commission and tailored precisely along lines dictated by him. That panel, headed by King's ABCC chairman, John Larkin, labored for months to produce the bill for King.

So it was on the eve of Halloween when Freddy Martignetti learned that Ed King, his pal, planned to veto Primary Source.

"I'm sick. I can't believe it," a stunned Martignetti told everyone he ran into during the next 48 hours.

He couldn't believe that his longtime friend could welch on the commitment and go back on his word. Sure, he had heard some of the many stories about King's unreliability, but he either didn't believe them or didn't want to, on the assumption that his bond with "Eddie" transcended any possibility of a run-out by the governor.

At least he isn't alone

When Martignetti finally got in to see King last Wednesday to discuss the matter, the answer was the same. King tried to soften the blow by suggesting that he could send a special message to take care of Martignetti's package store problem, but Martignetti wasn't taken in, knowing there was no chance such a proposal could survive by itself.

Thus does Martignetti join a growing list of people, many of them former friends of the governor, who have been duped by the chief executive. The list of Walter Hurleys, Paul Heffernans et al is too long to detail in this space. Frank Rich, who grew up with the governor in East Boston, is the most notable of the group. He got burned so often by King's failure to keep his word and commitments that he decided to run against him.

King's next walkout will embrace Quincy Mayor Arthur Tobin, a former state senator who had expected to be appointed clerk/magistrate of Quincy District Court.

When former clerk Dinny Ryan died earlier this year, King confided in intermediaries that Tobin was in the driver's seat for the position. So certain was Tobin of that commitment that he did not seek re-election last week.

But now King has had his faithful servants on his Judicial Nominating Committee come up with another candidate — this one an assistant court

clerk in Plymouth County — and Tobin will be sacrificed. The upcoming bypass of Tobin has worsened the governor's already poor relations in the Senate where Tobin was a popular member. And it has relegated Senate President William M. Bulger's break with King to point-of-no-return status.

Intermediaries have been trying to heal the chasm between Bulger and King, but to no avail. Now their differences are irreconcilable.

In his dealings with the Senate leader, with House Speaker Thomas W. McGee and virtually everyone else in state government, King has demonstrated an attitude which demands total obeisance in exchange for whatever patronage crumbs the governor sees fit to dispense.

It has taken some political figures a long time to realize that King operates on a one-way street and regards all other state officials — duly elected constitutional officers, elected legislators, judges and other members of the judiciary — as subordinates of the executive, with their principal function to serve him, the master.

That condescending attitude never was more in evidence than in October when King called a judge and demanded that he change a decision he had rendered in a gang-rape case. The judge acquiesced and proved two things: 1.) King's original appointment of him was a colossal blunder. 2.) He is unfit to remain on the bench.

David Farrell is a Globe political columnist.

NOLAN, J. (concurring in part and dissenting in part). I agree with the court's determination that the case should be remanded to the Superior Court for trial on counts 1 and 2, the counts in which the plaintiff alleges that he was libeled by the Farrell column of November 8, 1981. I also agree with the court's determination that the Superior Court correctly granted summary judgment with respect to counts 3 through 6 and counts 9 through 12. I disagree, however, with the court's disposition regarding the Ackerley billboard cartoon (Appendix C) which is the subject of counts 7 and 8. Because I think that there is a material issue of fact to be resolved, I dissent from that portion of the court's opinion which affirms the granting of summary judgment on those counts.

A jury question exists in a defamation action if the challenged statement is susceptible of being read by an average reader as either a factual statement or an opinion. *Aldoupolis* v. *Globe Newspaper Co.*, 398 Mass. 731, 733 (1986). *Myers* v. *Boston Magazine Co.*, 380 Mass. 336, 339-340 (1980). A cartoon is subject to the law of libel and, like any other form of depiction, "it may be found libelous if it maliciously presents as fact defamatory material which is false." *Yorty* v. *Chandler*, 13 Cal. App. 3d 467, 472 (1970). See *Russell* v. *McMillen*, 685 P.2d 255, 259 (Colo. Ct. App. 1984); Restatement (Second) of Torts § 566 comment d (1977). In *Yorty*, the court suggested that "a political cartoon which falsely depicts a public official selling franchises for personal gain, or a judge taking a bribe, or an attorney altering a public record, or a police officer shooting a defenseless prisoner, will not be exempt from redress under the laws of libel merely because the charge is depicted graphically in linear form rather than verbally in written statement." *Yorty, supra* at 472. Such is the nature of the cartoon here. Notwithstanding the facts disclosed in the accompanying editorial, the average reader could have interpreted that cartoon as stating that the Governor and the Secretary of Transportation accepted cash bribes in exchange for taking actions favorable to Ackerley Communications and to the billboard industry. Contrary to the defendants' assertions, nothing in the cartoon suggests that persons associated with Ackerley Communica-

tions merely contributed toward the Governor's campaign. The use of the word "pockets," along with the depiction of bags of cash in the hands of the Governor and the Secretary (who had no campaign fund to accept contributions), could lead the average reader to conclude that Ackerley Communications bribed the Governor and his cabinet secretary. "[W]hen an 'opinion' is something more than a generally derogatory remark [and] is laden with factual content, such as charging the commission of serious crimes, the First Amendment confers no absolute immunity." *Cianci* v. *New Times Publishing Co.*, 639 F.2d 54, 63 (2d Cir. 1980). Since the average reader could have interpreted the cartoon as charging a serious crime, it is for the jury to determine whether the cartoon was in fact defamatory.

I also think there is an issue of fact for the jury on whether the defendants acted with actual malice in publishing the Ackerley cartoon. Actual malice is proved "by a showing that the defamatory falsehood was published with knowledge that it was false or reckless disregard of whether it was false." *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 867 (1975). In this case both the cartoonist and the editor of the editorial page were aware that Ackerley had not actually put money in the pockets of the Governor or the Secretary of Transportation, yet neither the cartoonist nor the editor took any steps to disclose this fact in the cartoon. In addition, both the cartoonist and the editor could not remember whether they read the entire news story on which the cartoon was based. If the jury were to conclude that the cartoon made false and defamatory statements of fact, the jury would also be warranted in drawing inferences from these omissions in finding malice. Thus, I would remand the case for trial on the Ackerley cartoon as well as on the Farrell column. "The protection of the freedom of a responsible press does not require that we insulate from liability for libel the artists whose pens drip venom and whose skill in drawing and cartooning far exceeds their sense of responsibility, respect for the truth and the depth of their understanding of public issues." *Yorty, supra* at 479 (Compton, J., concurring in the result).

Appendix B.

COMMONWEALTH OF MASSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 52488

EDWARD J. KING

vs.

GLOBE NEWSPAPER COMPANY & others[1]

MEMORANDUM OF DECISION ON DEFENDANTS' RENEWED MOTION FOR SUMMARY JUDGMENT

Should this defamation action, brought by the plaintiff when he was the Governor of the Commonwealth of Massachusetts, against the Globe Newspaper Company (Globe), two of its writers and its political cartoonist, go forward to jury trial on any or all of the 12 counts alleged in the Amended Complaint? Or, on the contrary, should the defendants' renewed motion for summary judgment be granted as to some or all of those counts? That is the question which must be decided at this time. After due consideration of the extensive file, the detailed memorandum of counsel, and their oral arguments, I am of the opinion that the defendants are entitled to summary judgment in their favor dismissing all counts.

1. *Procedural background and history.*

The plaintiff commenced this action of libel by filing a Complaint on January 4, 1982. Nine days later he substituted an Amended Complaint, which is in 12 counts, against four

[1] David Farrell; Robert Turner; and Paul Szep.

defendants: (1) Globe Newspaper Company d/b/a the Boston Globe and Boston Sunday Globe, (2) David Farrell, (3) Robert L. Turner, and (4) Paul Szep.

On January 25, 1982, the defendants jointly filed (1) an answer and (2) a motion for summary judgment, accompanied by five affidavits. The motion for summary judgment prompted the plaintiff to move for a continuance. On February 26, 1982, the motion for continuance was allowed.

Thereafter a campaign of discovery by all parties ensued, including interrogatories, requests for production of various documents, a request to admit facts, and a number of oral depositions of both party and non-party deponents.

On August 26, 1982, the plaintiff's motion to further amend his Complaint,[2] assented to, was allowed. Discovery in depth continued.

On March 1, 1983, the plaintiff filed his opposition to the still pending motion for summary judgment, his own affidavit and that of his counsel (with attachments). On March 2, 1983, the motion for summary judgment was denied, without opinion.[3] On April 8, 1983, the defendants filed a motion seeking a rehearing, or, in the alternative, an interlocutory report to the Appeals Court of the legal correctness of the denial of the summary judgment motion, pursuant to Mass. R. Civ. P. 64, and G.L. c. 231, § 111. That motion was denied by the motion judge on June 9, 1983, the order stating that the court "declines to report to the Appeals Court the question if the defendants' motion for summary judgment was properly denied."

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[2] The second amendment added or substituted new material in paragraphs 37, 45, 52, 60, 82 and 90.

[3] There was, of course, no requirement that the judge hearing the motion (who was not the undersigned justice) give his reasons for denial; it was unnecessary that he find facts or state conclusions of law. Mass. R. Civ. P. 52(a) (last sentence.)

The docket reflects no further activity for the balance of 1983, after the filing of one deposition on July 16; nor is there any further entry herein until more than two years later, when on August 12, 1985, further answers on an oral deposition were filed.

Commencing August 23, 1985, there was substantial renewed activity, with particular emphasis on the taking of a number of oral depositions.[4]

On November 21, 1985, the undersigned justice was specially assigned to all further aspects of the case.[5]

After the assignment was made, I held an informal conference with counsel on November 25, 1985, at which time a target date of March 3, 1986, was fixed for trial.

Thereafter, the parties filed various discovery motions, which prompted a hearing by me on January 13, 1986, a date originally set for a monthly status conference. The several motions were heard and taken under advisement, and subsequently decided.

After a detailed study of the papers on file (during which time [on January 24, 1986] the defendants filed a "Renewed Motion for Summary Judgment" with affidavits and other assorted supporting materials, including a memorandum of law), on January 30, 1986, I issued a "Memorandum and Interlocutory Order #1". That Order provided, *inter alia*, that the court would hold a hearing on various specified issues "as they embody current principles of constitutional law in defamation cases" and likewise provided for the filing by the plaintiff of a statement, in the form of an offer of proof or substantial equivalent, setting forth in detail, count by count, the factual

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[4] A list of those who have been deposed in this case is attached to this Memorandum as Appendix "A".

[5] The special assignment by the Chief Justice for all further pre-trial and trial proceedings was made pursuant to the provisions of Standing Order No. 9-80, and followed a "Joint Request of the Parties for Special Assignment."

evidence which he proposed and intended to present in support of each of the counts in his Complaint, as most recently amended. It was further directed that the statement should include specific reference to the source of such evidence, i.e. deposition transcript, answer to interrogatory, response to request for admissions, anticipated witness's testimony, etc.. It was further provided that the plaintiff should file at the same time such brief or memorandum (and supporting affidavits, if any) as he desired, stating his position on the several issues designated in the Memorandum and Order. The defendants were given leave to file a seasonable response.

Pursuant to the mandate contained in Interlocutory Order #1, the plaintiff did file a detailed statement, buttressed, by several affidavits and other supporting material, of his factual and legal positions as to each of the counts he has brought, asserting and arguing that as to each count he is entitled to a jury trial. The defendants likewise seasonably filed a response, with factual and legal underpinning.

In accordance with an established schedule, the parties argued their respective positions on March 14, 1986, after which the defendants' Renewed Motion for Summary Judgment was taken under advisement.

2. *The Role of Summary Judgment in Cases Alleging Defamation.*

Summary judgment is properly rendered in a civil action when there is no genuine issue of material fact and when the moving party is entitled to prevail as a matter of law. Mass. R. Civ. P. 56. On motion for summary judgment by a defendant on the ground that a plaintiff has no valid claim, the defendant as moving party has the burden of producing evidence which, considered with an indulgence in the plaintiff's favor, negatives the plaintiff's claim. See *Godbout* v. *Cousens*, 396 Mass. 254, 258 (1985). Where appropriate, our courts have not hesitated to use, and indeed favor, summary disposition in defamation

actions. *Cefalu* v. *Globe Newspaper Co.*, 8 Mass. App. Ct. 71, 74 (1979). "Allowing a trial to take place in a meritless case would put an unjustified and serious damper on freedom of expression." *Appleby* v. *Daily Hampshire Gazette*, 395 Mass. 32, 37 (1985), quoting *National Ass'n of Government Employees* v. *Central Broadcasting Corp.*, 379 Mass. 220, 223 (1979), cert. denied 446 U.S. 935 (1980). Indeed, the "threat of being put to the defense of a lawsuit . . . may be as chilling to the exercise of First Amendment freedoms as fear of the outcome of the lawsuit itself." *Cefalu* v. *Globe Newspaper Co.*, *supra* at 74, quoting *Washington Post Co.* v. *Keogh*, 365 F.2d 956, 968 (D.C. Cir. 1966), cert. denied, 385 U.S. 1011 (1967). See *Rosenbloom* v. *Metromedia, Inc.*, 403 U.S. 29, 52-53 (1971).

Notwithstanding the important concern for an uninhibited free press expressed in these cases, the appropriateness of summary judgment is somewhat lessened when "actual malice" is the subject to inquiry. As the Supreme Court admonished in oft-cited dicta in *Hutchinson* v. *Proxmire*, 443 U.S. 111, 120 n.9 (1979), proof of a media defendant's subjective awareness of truth or falsity of a challenged statement does not readily lend itself to summary disposition. That does not mean that the non-moving party in a summary judgment motion "is entitled to trial simply because he has asserted a cause of action to which state of mind is a material element." *NAGE* v. *Central Broadcasting Corp.*, *supra* at 231. Traditional rules of procedure, however, require a motion judge to exercise an extra measure of caution in granting summary judgment when resolution of a dispositive issue requires a determination of a state of mind. Nonetheless, "the issue [of actual malice], even though it involves [such] a determination . . . , is not automatically a jury question." *Aarco, Inc.* v. *Baynes*, 391 Mass. 560, 564 (1984). See *Loeb* v. *Globe Newspaper Co.*, 489 F.Supp. 481, 487-488 (D.Mass. 1980). "There must be some indication that [the plaintiff] can produce the requisite quantum of evidence

to enable him to reach the jury with his claim." *Central Broadcasting, supra* at 231.[6]

3. *The Propriety of Again Entertaining the Defendants' Motion for Summary Judgment.*

As noted above, this case has previously been before the Superior Court on defendants' motion for summary judgment, which was denied on March 2, 1983, with motions for reconsideration and a report each denied. What, then, is the judicial propriety of still another judge now entertaining that motion?

I have determined to entertain the motion, with marked reluctance.[7] A judge should be hesitant to examine (and particu-

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[6] Precisely what constitutes a "requisite quantum" is the subject of considerable dispute. A summary analysis of libel case law reveals a split among the various state and federal courts as to the standard of proof required at summary judgment to establish the existence of actual malice. Compare, e.g., *Herbert* v. *Lando*, 781 F.2d 298, 305 (2d Cir. 1986) (evidence must be clear and convincing) with *Liberty Lobby* v. *Anderson*, 746 F.2d 1563 (D.C. Cir., 1984) (ordinary summary judgment standards apply). See also *McIntyre* v. *Westinghouse Broadcasting Co.*, 479 F.Supp. 808 (D.Mass. 1979). The case law in Massachusetts thus far neither mandates nor proscribes the application of the "convincing clarity" standard of proof at summary judgment. The court's consideration of the matter has mostly occurred in the context of cases suffering the same fatal flaw, viz., the absence of any evidence directly or inferentially demonstrating actual malice; and thus these cases warranted summary disposition under the standard of proof ordinarily applied. *Godbout* v. *Cousens*, 396 Mass. 254 (1985); *Aarco, Inc.* v. *Baynes*, 391 Mass. 560 (1984); *NAGE* v. *Central Broadcasting Corp., supra*. Cf. *Lyons* v. *New Mass Media*, 390 Mass. 51 (1983) (summary judgment reversed where "sufficient quantum of evidence" averred). I note with interest a curious footnote in *Myers* v. *Boston Magazine Co., Inc.*, 380 Mass. 336 (1980). In footnote 5, the court indicates in dicta that a basis for its decision in *Central Broadcasting* was that the plaintiff "had not known *sufficiently clear and convincing envidence* from which a jury could find actual malice." At 340-341 (emphasis added). Nonetheless, absent a clear pronouncement from a higher authority on this matter, I will apply to the present case the lesser standard of "some indication" to the extent that it is necessary to do so.

[7] These are the same considerations which I articulated in my "Memorandum and Interlocutory Order #1." I repeat them here so that my thinking in this regard will be contained in this Memorandum, dispositive of the issues.

larly to undo) the work of another judge. It is undoubtedly appropriate to honor what a colleague has ordered earlier in a case. But, though there is no duty to reconsider a case, an issue, or a question of fact or law once decided, the power to do so remains in the court until final decision. It does not matter that a different judge heard the question before; it is open to another judge to review and modify, or even vacate, a prior order, if deviation from the first order is called for in the light of subsequent events, the public interest, or the interests of the parties. Deference to a colleague's rulings is a practice, not an inflexible rule. See *Commonwealth* v. *Carrunchio,* 20 Mass. App. Ct. 943, 944 (1985); *Serody* v. *Serody,* 19 Mass. App. Ct. 411, 412 (1985); and cases cited in both those decisions.

Here I find many compelling reasons for a court to take a "fresh look" at certain of the issues raised.

(1). Judicial resources for the trial of civil cases with juries are scarce.[8] Four-week trials entail lengthy service of juror-citizens, and prevent the hearing and disposition of other cases. Before commencing such a trial the trial judge should be reasonably confident that the facts which are likely to be proved, in the light of the law applicable to such facts, will result in eventual jury issues. Otherwise, the precious time expended in prolonged trials ending in directed verdicts or dismissals is squandered. Especially in defamation cases the court should be persuaded that there is probable cause for a jury to consider and decide.

(2). Trial judges have a particular duty to scrutinize the defamation case, and to insure so far as is possible that constitutional requirements in this area are met, before submitting issues to a jury.

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[8] At the commencement of 1986 there were pending in Suffolk County alone 20,185 civil actions to be tried. Approximately 50% entail claimed jury trials.

(3). The constitutional law of defamation is still evolving and being shaped by both Massachusetts and federal courts. In the three years which have elapsed since the motion for summary judgment was denied, there have been many appellate decisions which have added to the body of law in this area. This case should be re-examined in the light of those principles.

(4). This case is a prototypical public official against newspaper case. *Times* v. *Sullivan,* 376 U.S. 254 (1964). As such it necessarily implicates constitutional issues of importance and subtlety.

(5). The challenged publications are several in number. They consist not only of editorials and articles, but also of political cartoons. Different concepts may be applicable depending upon the category of publication involved.

(6). In particular, a pre-trial judicial analysis should be made as to the following issues, given the expected evidence at trial: whether a publication consists of protected expression of opinion; whether it is defamatory or not; whether it involves any undisclosed or assumed defamatory facts; and finally, if other prerequisites are met, whether the defendants published a defamatory falsehood with "constitutional malice", i.e. with knowledge of falsity or in reckless disregard of whether it was false.

(7). As detailed above, the parties have by now, through extensive discovery proceedings, investigated the facts far beyond the point reached when the motion for summary judgment was heard in 1983. They have extensively outlined what the reasonably expected trial evidence will be. A judge in 1986 is now in a better position to evaluate the case upon current constitutional principles.

All of these reasons, among others, have militated in favor of a re-examination of the basic legal issues in this case, as applied to the challenged publications, before any prolonged trial takes place. I now make such a re-examination.

4. *The Format of This Memorandum.*

After discussing the law applicable to matters of opinion and fact as they relate to political cartoons, political editorials and articles, and political satire, I shall then proceed to analyze the plaintiff's several claims for relief, which fall into three separate categories[9]:

1. The *Szep* Cartoons (and a connected editorial)[10]
   (Counts VII through XII)
2. The *Turner* Satirical Column
   (Counts V and VI)
3. The *Farrell* Articles
   (Counts I through IV)

5. *The Applicable Law as to Opinion and Fact with Reference to Political Cartoons, Political Satire, etc.*

Like any other published statement, a humorous statement (whether it be a cutting political cartoon, an acerbic satire, or any other form) which expresses an opinion on a public issue may sustain an action for libel if it is based on a false statement of known or assumed fact or on undisclosed defamatory facts of which the reader is unaware. See Restatement (Second) of Torts § 566 (1977). While "humor is a protected form of free speech, just as much to be given full scope, under appropriate circumstances, as the political speech, the journalistic expose, or the religious tract," *Salomone* v. *Macmillan Pub. Co. Inc.*, 411 N.Y.S.2d 105, 108 (1978), it is not categorically protected by the First Amendment. As an Irish court noted many years

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[9] Each count against the individual author, viz. Farrell, Turner, Szep, is paired with the equivalent count against the defendant Globe Newspaper Company, which is charged with liability on *respondeat superior* principles. There is no question but that the corporate defendant is liable here, if the employee is; and that, if the employee is not, then the employer newspaper is not liable. For convenience, hereafter, the collective term "defendants" is often used, without specification as to which individual defendant is involved.

[10] One Szep cartoon is logically paired with a companion editorial ("The Old Billboard Game"), and, accordingly, the two are treated together.

ago, "The principle is clear that a person shall not be allowed to murder another's reputation in jest." *Donoghue* v. *Hayes* (1831), Hayes, Irish Exch. 265, 266, quoted in *Salomone, supra* at 109. Thus, a humorist or satirist who publishes a statement to make a defamatory point may be exposed to liability under the law of libel. Similarly, the publisher of a cartoon is not exempt from redress "merely because the charge is depicted graphically in linear form rather than verbally in written statement." *Yorty* v. *Chandler*, 13 Cal App. 3d 467 (1971). The plaintiff, however, must show that the challenged cartoon contained "a false statement of facts as distinguished from opinion, which is protected by the first amendment." *Keller* v. *Miami Herald Pub. Co.*, 778 F.2d 711, 715 (11th Cir. 1985). The humorous context in which the alleged libel appears will be probative that the statements were opinion rather than fact. *Myers* v. *Boston Magazine Co.*, 380 Mass. 336 (1980). A brief outline of the law concerning the distinction between fact and opinion is thus in order.

The Supreme Judicial Court has had frequent occasion to define the contours of the opinion/fact dichotomy in an action of defamation. *Pritsker* v. *Brudnoy*, 389 Mass. 776 (1983); *Cole* v. *Westinghouse Broadcasting Co.*, 386 Mass. 303 (1982), cert. denied, 103 S. Ct. 449 (1983); *Myers* v. *Boston Magazine Co.*, 380 Mass. 336 (1980); *National Ass'n. of Gov't. Employees* v. *Central Broadcasting Corp.*, 379 Mass. 220 (1979), cert. denied, 446 U.S. 935 (1980). It is a determination which that court has deemed "critical." *Cole* v. *Westinghouse Broadcasting Co.*, 386 Mass. 303, 308 (1982). "In this context courts apply the Constitution by carefully distinguishing between statements of opinion and fact, treating the one as constitutionally protected and imposing on the other civil liability for its abuse." *Cole* at 308-309, quoting *Gregory* v. *McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (1976). The Superior Court has acknowledged that opinions are accorded a

special status in the free flow of public discourse: "[H]owever pernicious an opinion may seem, we depend for its correction not on the conscience of judges and juries but on the competition of other ideas." *Gertz* v. *Robert Welch Inc.*, 418 U.S. 323, 339-340 (1974).

The courts in the various jurisdictions appear to be agreed that the fact/opinion determination is a question of law to be decided by the trial judge. *Cole, supra* at 309; *Rinaldi* v. *Holt, Rinehart, & Winston, Inc.*, 421 N.Y. 2d 369, 381, cert. denied, 434 U.S. 969 (1977); *Henry* v. *Halliburton*, 690 S.W. 2d 775 (Mo. 1985); *Bucher* v. *Roberts*, 198 Colo. 1, 3 (1979); *Gregory* v. *McDonnell Douglas Corp.*, 17 Cal. 3d 596, 601 (1976); *Keller* v. *Miami Herald Pub. Co.*, 778 F.2d 711, 715 (11th Cir. 1985). As enunciated by our own courts, the test to be applied in deciding whether statements can be understood reasonably as fact or opinion

> requires that the court examine the statement in its totality in the context in which it was uttered or published. The court must consider all the words used, not merely a particular phrase or sentence. In addition, the court must give weight to cautionary terms used by the person publishing the statement. Finally, the court must consider all of the circumstances surrounding the statement, including the medium by which the statement is disseminated and the audience to which it is published.

Cole, 386 Mass. at 309, quoting from *Information Control Corp.* v. *Genesis One Computer Corp.*, 611 F.2d 781, 784 (9th Cir. 1980). See *Fleming* v. *Benzaquin*, 390 Mass. 175, 180-181 (1983). Although the initial determination is one of law, if the trial judge concludes that the challenged remarks are not unambiguously fact or opinion but instead could be understood by the average reader to be either, the issue must be left to the jury's determination. *Myers* v. *Boston Magazine Co., Inc.*, 380 Mass. 333, 340 (1980).

The inquiry does not end in the event the trial judge determines as a matter of law that an allegedly libelous statement is unambiguously an opinion, thus meriting constitutional protection. The judge must next consider the distinction expressed in the Restatement (Second) of Torts § 566 (1977), as adopted by our courts, between "pure" opinion and "mixed" opinion. The former category comprises those opinions based upon disclosed or assumed non-defamatory facts.[11] A "pure" opinion by itself is not actionable no matter how unjustified and unreasonable the opinion may be or how derogatory it is. *Pritsker* v. *Brudnoy*, 389 Mass. 776, 778 (1983). This is so because readers can interpret the disclosed or assumed factual statements and decide for themselves whether the writer's opinion is justified. On the other hand, a "mixed" opinion is actionable if the comment is reasonably understood as implying the existence of undisclosed facts about the plaintiff, defamatory in character, in order to justify the opinion. *Id.*

The plaintiff here maintains that each article and cartoon constitutes a false statement of fact, actionable in itself, or, alternatively, constitutes an actionable statement of opinion based upon undisclosed defamatory facts. Thus, I am confronted with two important threshold questions that are proper for determination at this stage of the litigation: first, whether each allegedly libelous statement can reasonably be read as a statement of fact, or is rather an expression of opinion; and, second, whether the expression of opinion, if unambiguously found, is capable of bearing a defamatory meaning because it

[11] According to comment b following § 566, a fact is "disclosed" when "the maker of the comment states the facts on which he bases his opinion of the plaintiff and then expresses a comment as to the plaintiff's conduct, qualifications, or character." A fact is "assumed" when "the maker of the comment does not himself express the alleged facts on which he bases the expression of opinion [but] both parties to the communication know the facts or assume their existence and the comment is clearly based on those assumed facts and does not imply the existence of other facts in order to justify the comment."

may reasonably be understood to imply the assertion of undisclosed defamatory facts that justify the opinion. The challenged statements are to be "taken in their natural sense, and without a forced or strained construction . . .". *Myers, supra* at 341, quoting *Peck* v. *Wakefield Item Co.*, 280 Mass. 453 (1932); compare *Lyons* v. *New Mass Media,* 390 Mass. 51, 60-61 (1983).

6. *The Szep Cartoons.*

A. *The March 12, 1981 "Appointments" Cartoon*[12] (Counts IX and X)

This cartoon depicts the plaintiff attired in a pinstripe suit, a black shirt, and a white tie upon which the words "Can Do" appear, holding a hat with a pin-wheel, and handcuffed to a police officer who is reading off to a desk sergeant a list of the plaintiff's controversial political appointments: ". . . [T]he appointment and forced resignation of Stephen Guptill, the appointment and forced resignation of Stephen Clifford, the appointment and forced resignation of John Haggerty, the appointment and forced resignation of Barry Locke . . ."

In claiming that the cartoon is defamatory, the plaintiff contends that it states as fact that he was a criminal or had the mental state of a criminal; that he had appointed the named individuals knowing of their criminal or unethical conduct; that he was guilty of misconduct and maladministration; and that he was possibly subject to impeachment.

Having examined the cartoon in light of the guiding principles discussed above, and bearing in mind the appropriate standards to be applied at this stage of the litigation, I conclude that an average reader could not reasonably interpret the cartoon as conveying the facts which the plaintiff has articulated. Indeed, the strictly literal interpretation that the plaintiff urges does not comport with any reasonable interpretation of the

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[12] A copy of this cartoon is attached to this Memorandum as Appendix "B".

evidence in this case. Instead, I view the cartoon as unambiguously expressing the cartoonist's own opinion through the use of "artistic rhetorical hyperbole," a common device of the political cartoonist and, as such, I conclude that it cannot reasonably be viewed as stating a fact. *Myers, supra* at 340 and nn. 4, 5. Thus, the cartoon is not actionable.

In *Keller* v. *Miami Herald Pub. Co., supra,* the Eleventh Circuit Court of Appeals analyzed a cartoon similar in certain visual respects to Szep's "appointments" cartoon. The *Keller* cartoon depicted a nursing home, then the focus of considerable public attention and owned by the plaintiff Keller, in a state of total disrepair. Three men in that cartoon, one of whom might reasonably have portrayed the plaintiff Keller, are dressed like gangsters and carry bags of money. The complaint in *Keller* alleged that the plaintiff there had been defamed because the cartoon inaccurately depicted physical conditions at the nursing home, and because the cartoon falsely identified him as a criminal. The court disagreed, stating that "[n]o one could reasonably have considered the cartoon here as portraying the actual conditions [at the nursing home] . . . . Likewise, it would have been unreasonable to interpret the cartoonist as alleging that [the plaintiff] was involved in specific criminal activity or was a member of organized crime merely because the three men in the cartoon were dressed like gangsters." At 716. In taking note of the nature of political or editorial cartoons as a medium of expression, the *Keller* court recognized that "[c]artoonists employ hyperbole, exaggeration, and caricature to communicate their messages to the reader. One cannot reasonably interpret a cartoon as literally depicting an actual event or situation." *Id.* Thus, viewed through the cartoonist's lens of exaggeration and fancy, the publicized disrepair at the nursing home becomes the flagrant dilapidation depicted, and the plaintiff's profit from the nursing home is expressed loosely and figuratively in the gangster caricature.

Taking into consideration "the medium by which the statement is disseminated," *Cole, supra* at 309, enlightened by the insights of the Eleventh Circuit noted above, I can only conclude that Szep's "appointments" cartoon is no more than a graphic expression of his views and opinions that the plaintiff Governor was responsible for numerous ill-advised political appointments. No reasonable viewer would consider it a factual report that the plaintiff had been arrested, handcuffed, and charged, or was a criminal, or knew of criminal or unethical conduct of his appointees before their selection. Even if the plaintiff's depicted attire is that of the criminal underworld,[13] Szep was clearly using the gangster caricature "in a loose, figurative sense." *Old Dominion Branch No. 496, Nat'l. Assoc. of Letter Carriers* v. *Austin*, 418 U.S. 264, 284 (1974). The reading of the charges, the handcuffs, and the other cited details must fall within that category which the courts have called "rhetorical hyperbole." See *Greenbelt Cooperative Publishing Ass'n* v. *Bresler*, 398 U.S. 6, 14 (1970) (publisher used term "blackmail" to characterize negotiating position of public figure in heated city council meetings); *Miller* v. *Charleston Gazette*, 9 Media L. Rep. 2540, 2545 (W. Va. Cir. Ct. 1983) (cartoon allegedly suggested offensive sexual impropriety on the part of plaintiff).[14]

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[13] As was said in *Cohen* v. *New York Herald Tribune, Inc.*, 310 NYS 2d 709, 721 (1970), "These unflattering characterizations of the plaintiff were stylistic and satirical touches of the author's piquant pen."

[14] For other cases in which editorial and political cartoons were held to constitute protected expressions of opinion, see *Franklin* v. *Friedman*, 12 Media L. Rep. 1146 (N.Y. Sup. Ct. 1985) (comic strip depicted well-known talk show host as visibly shrinking physically and ultimately being fired from his job); *Russell* v. *McMillen*, 685 P.2d 255 (Colo. Ct. App. 1984) (cartoon, published with an article and editorial, implied that a transaction involved profit to a public official under questionable circumstances); *Silberman* v. *Georges*, 456 N.Y.S. 2d 395 (N.Y. App. Div. 1982) (painting allegedly equated plaintiffs with muggers and robbers and accused them of criminal activity); *Walker* v. *Southeastern Newspapers*, 9 Media L. Rep. 1516 ([Ga.] 1982)

The plaintiff fares no better in his contention that the cartoon is an expression of mixed opinion, i.e. is based upon undisclosed defamatory facts, which therefore does not share in the First Amendment protection accorded pure opinion. The undisclosed facts alleged by him basically include those discussed above as disclosed facts, in addition to the newly introduced "facts" that plaintiff is an individual of low intelligence, and that he ignored information about the appointees provided him by investigators. "It is the function of the court to determine whether an expression of opinion is capable of bearing a defamatory meaning because it may reasonably be understood to imply the assertion of undisclosed facts that justify the expressed opinion about the plaintiff or his conduct . . ." Restatement (Second) of Torts § 566, comment c at 173 (1977), quoted in *Cole, supra* at 313. The considerable publicity generated by the various resignations formed the disclosed factual basis for Szep's opinion. The unrevealed facts suggested by the plaintiff are either not facts susceptible of verification (his "low intelligence") or not implied (his "criminality" or state of mind). The cartoon simply cannot bear the defamatory meaning which the plaintiff would assign to it.[15]

(cartoons allegedly conveyed impression that Human Relations Commission executive director was guilty of misappropriating commission funds); *Yorty* v. *Chandler*, 91 Cal. Rptr. 709 (1970) (cartoon allegedly depicted Mayor as mentally deranged and in need of a straight jacket). See also *Wefler* v. *Indianapolis Newspapers*, 7 Media L. Rep. 1876 (Ind. 1981); *Ferguson* v. *Dayton Newspapers*, 7 Media L. Rep. 1396 (Ohio Ct. of Common Pleas 1981). Here the plaintiff has pointed to no decision in which such a cartoon has been held actionable.

[15] Citing *Schrottman* v. *Barnicle*, 386 Mass. 627 (1982), the plaintiff maintains that, since characterizations of a person's state of mind constitute statements of fact, the defendants' "misrepresentation of plaintiff's state of mind misrepresents a statement of fact, even though it is an opinion." Plaintiff's Memorandum of Law and Fact, p. 139. I do not agree with the plaintiff's rendering of *Schrottman*, nor do I find any support or clarification in the law for the proposition relied upon here. Questioning the attitudes, motives, beliefs, and values of political leaders partakes of the uninhibited, robust, and wide-open debate on public issues which the courts are constitutionally bound to protect.

For these reasons, I conclude that the expression in the cartoon about the plaintiff was a pure opinion and, therefore, protected from this libel suit by the First Amendment.

B. *The November 9, 1979, "School Prayer Bill" Cartoon*[16] (Counts XI and XII)

This Szep cartoon is entitled "KING SIGNS SCHOOL PRAYER BILL" and depicts the plaintiff at a desk signing what could reasonably be regarded as the so-called school prayer bill. He is flanked by two symbolic figures labelled, respectively, "Patronage" and "Cronyism". "Patronage" carries in his left-hand pocket a satchel bearing the caption "pay raise." "Cronyism" appears to hold the plaintiff's arm as the latter signs the school bill. In front of "Cronyism" are packets of dollar bills. The caption to the cartoon reads, "SO LET US PREY!"

The plaintiff maintains that the cartoon falsely states as fact that he signed the school prayer bill, and did so for corrupt, improper, or wrongful motives; and that he signed the school prayer bill or the pay raise bill, or both, in return for cash payments. Again, largely for the reasons stated in the preceding section, I am constrained by the materials before me to conclude that a jury could not reasonably find that the cartoon stated the "facts" which he posits. Even the most careless reader would have to perceive that the cartoon is an allegory, using persons, visual metaphor, and symbols "to convey a hidden meaning extracted by a reasoning process." *Miller* v. *Charlestown Gazette*, 9 Media L. Rep. 2540, 2545 (W. Va. Cir. Ct. 1983). The statements contained in it obviously are no more, again, than the cartoonist's rhetorical hyperbole, used to express vigorously his opinion about a relationship between two official decisions made by the plaintiff, rather than to convey the hard factual details of a corrupt transaction. Overstatement is the cartoonist's stock in trade. That the plain-

[16] A copy of this cartoon is attached to this Memorandum as Appendix "C".

tiff's eyes are cast heavenward as he signs the purported legislation cannot reasonably be read as a factual statement about his religious beliefs. Nor can the image of "Cronyism" holding, or even twisting, his arm be reasonably interpreted as an accusation by the defendants that bribery, extortion, or any other untoward conduct literally took place at the signing. See *Silberman* v. *Georges*, 456 N.Y.S. 2d 395 (N.Y. App. Div. 1982). Moreover, the caption "SO LET US PREY!" is obviously intended as a pun on the homophonetic words "pray" and "prey." When the caption is read in tandem with the allegorical figures depicted, the fanciful, fictional nature of the presentation is manifest. I rule that the statements contained in the cartoon could only be found to be opinion.

Alternatively, the plaintiff points to alleged underlying facts, undisclosed in the cartoon, which he says form the basis for the opinion expressed there. In addition to reiterating and expanding the disclosed "facts" discussed above, the plaintiff adds the following asserted "facts": he signed the school prayer bill and/or the pay raise bill because his "cronies" wanted him to; he was preying on the public by enacting legislation for monetary compensation; he hypocritically signed the bill; his religious beliefs are insincere; he did not act of his own free will, and is a dupe for other interests; and he received monetary compensation in exchange for his signature. These allegations add nothing to the merits of his claim. As was true in *Keller* (at 718), "the facts surrounding the . . . affair had been well-publicized so that the [newspaper's] readers were aware of the series of events upon which the cartoonist based his opinion." The alternative set of "facts" put forth here are, again, either not *factual* at all (his religious insincerity, his hypocrisy, his preying on the public), cannot be reasonably inferred from the cartoon (he received cash payments for his signature), or are too vague and imprecise to bear the alleged defamatory meaning (he is a "dupe" who acted in behalf of "cronies"). The

cartoon is a pure expression of opinion that merits the full protection of the First Amendment. The plaintiff's claim as to this cartoon is simply not actionable under current constitutional and other decisional principles.

C. *The October 18, 1979, "Billboard"*[17] *Editorial and related Szep Cartoon*

(Counts VII and VIII)

On October 17, 1979, the Globe published an article prepared by its Spotlight Team of investigative reporters which detailed the King Administration's relationship with the billboard industry. The Spotlight piece (which is not a part of the plaintiff's Complaint) reported efforts by Cabinet Secretary Barry Locke to protect and preserve certain billboards slated for removal. The article also reported that industry officials, friends, and relatives had contributed to the plantiff's 1978 gubernatorial election campaign. On October 18, 1979, the Globe published an editorial written by reporter Michael Kenney and a political cartoon drawn by the defendant Szep, both of which relied upon and drew from the investigative article. Specifically, the editorial reiterated a statement in the investigative report that a bill had passed into law "with King's signature" allowing a certain billboard to remain despite a court order to the contrary. In fact, pursuant to the Massachusetts Constitution[18], the bill passed into law without the Governor's signature. The editorial also noted, as reported in the investigative piece, that "seven of [Ackerley Communication's] executives (and their friends and relatives) discovered Edward J. King . . . and dropped $7,000 into his campaign treasury."

The *Szep* cartoon depicts a billboard on which the plaintiff and Barry Locke are pictured holding sacks inscribed with

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[17] Copies of this editorial and of the Szep cartoon are attached to this Memorandum as Appendices "D" 1 and 2, respectively.

[18] See Massachusetts Constitution, Part II, c. 1, § 1, Art. 11.

dollar signs. An inscription on the billboard reads, "Ackerley Billboards can put money in your pocket too!"

Turning first to the cartoon, I conclude once again that the defendants here enjoy the guarantee of the First Amendment protecting the expression of opinion. The statement of fact allegedly contained in the cartoon cannot logically be the literal scene depicted, i.e., that the plaintiff and Locke appeared on a public billboard holding sacks emblazoned with dollar signs. The alleged facts figuratively conveyed by the cartoon (that the plaintiff and Locke received personal cash contributions and/or payoffs from Ackerley) simply do not flow from a form of expression that clearly draws upon overstatement and extravagant symbolism to make its point. The cartoon implies nothing more than Szep's editorial judgment that the plaintiff's association with Ackerley raised questions of public concern. Moreover, this expression of opinion cannot reasonably be found to be based on undisclosed defamatory facts of which the reader is unaware. The investigative article published the previous day amply disclosed the facts upon which Szep formed his opinion. See *Russell* v. *McMillen*, 685 P.2d 255, 259 (Colo. Ct. App. 1984) (cartoon depicting public figure receiving money under questionable circumstances was symbolic expression of opinion espoused in accompanying article and editorial). See also *Gouthro* v. *Gilgun*, 12 Mass. App. Ct. 591, 592 (1981); *Walker* v. *Southeastern Newspapers*, 9 Med. L. Rep. 1516 (1982); *Okun* v. *Superior Court of Los Angeles County*, 629 P.2d 1369 (Cal. 1981).

For similar reasons the statements contained within the editorial entitled "The Old Billboard Game" fall within the ambit of protected opinion. Expressly based upon the Spotlight Team's investigative report of the previous day, the editorial is a critical, disapproving, and perhaps cynical commentary inveighing against the billboard industry's lobbying and business practices. The alleged defamatory statments occur in this context. Labelling the period prior to the plaintiff's tenure as

"the good government decade" is unquestionably an expression of pure opinion, as is any implication that his administration was contrastingly "corrupt and evil". Commenting that "industry money finally reached what must be the right places" is not a factual assertion of a crime but, rather, a moral criticism of objectives and methods. See *Okun* v. *Superior Court of Los Angeles County, supra* at 1379. The asserted nexus between the industry's campaign contributions to his gubernatorial campaign and subsequent actions of the plaintiff and his administration is well within the bounds of protected political discourse. "A statement regarding (1) a public official's business, social, or political affiliations, and (2) how those affiliations seem reflected in decision-making hardly constitutes a libelous charge of bribery and corruption." *Okun* at 1374. Referring to the plantiff as an "underdog" at the time of the contributions, even if capable of verification, is not in and of itself defamatory. Moreover, none of the statements viewed within their context implies the allegation of undisclosed defamatory facts as a basis. See *Cole* v. *Westinghouse Broadcasting Co., Inc.*, 386 Mass. 303, 313 (1982). As with the cartoons, the investigative piece disclosed the facts relied upon.

D. "*Actual Malice*" *and the Cartoons*

The plaintiff contends that Szep prepared each of his cartoons with knowing falsehood or reckless disregard of the truth of the statements, inferences, and innuendoes said to stem from them. Since I have concluded that the cartoons and the one accompanying editorial all fall within the protected area of opinion, I need not consider whether the defendants published the cartoons with actual malice as that phrase has been constitutionally defined. I pause here, however, to make the following brief observations.

a) The plaintiff points to Szep's statement, quoted in the American Bar Association Journal of January 1, 1986, as evidence of an impermissible intent on the latter's part in drawing the challenged cartoons. (Referring to the role of the political

cartoonist, Szep was correctly quoted as stating, "If you are doing your job properly, you are being malicious every day.") It can hardly be said that this comment amounts to objective evidence from which a jury could reasonably infer "actual malice". "'Actual malice' is a term of art, created to provide a convenient shorthand expression for the standard of liability that must be established before a State may constitutionally permit public officials to recover for libel in actions brought against publishers." *Cantrell* v. *Forest City Publishing*, 419 U.S. 245 (1974). It seems all too clear that Szep was not giving a constitutional dimension to what he perceives to be an inherent attribute of his vocation. The ordinary use of a word that carries both legal and colloquial meaning need not be a perilous affair. In saying that an effective cartoonist must be "malicious" every day, Szep could not reasonably be understood to mean that cartoonists must of necessity draw with knowing falsity or with recklessness on a daily basis.

The plaintiff further argues that the comment evidences Szep's ill will, i.e. his "common law malice", which may be introduced as evidence of constitutional malice. Even assuming that ill will can be considered as an element of actual malice (but see *Gouthro* v. *Gilgun*, 12 Mass. App. Ct. 591, 593 n.4 [1981]), Szep's characterization of his world view as a cartoonist is hardly an admission as to his state of mind regarding *this* plaintiff and *these* cartoons.

b) Even if I were to read the cartoons as figuratively stating the facts alleged by the plaintiff, I find no evidence in the record before me from which a jury could reasonably infer actual malice. The meaning that the plaintiff would find in Szep's "school prayer" cartoon (a charge that he participated in bribery and corruption) is not made more plausible by Szep's knowledge of Thomas Nast's reknowned vitriolic cartoons of an earlier era. That Szep is creatively indebted ("So let us prey" was originally a Nast caption) to a reknowned cartoonist

who sometimes depicted corruption, is not relevant to Szep's state of mind regarding this plaintiff. As to the "billboard" cartoon, the plaintiff has not shown that Szep's figurative depiction of a fact (the actual instance of a corrupt transaction) was made with "serious doubts as to the truth of [the] publication." *St. Amant* v. *Thompson*, 390 U.S. 727, 731 (1968). Szep's inability to definitively recall reading the entire Spotlight Team article does not signal the presence in his mind of "serious doubts". The "fact" which the plaintiff urges upon this court as being expressed in the "appointments" cartoon (that he knowingly appointed persons with unsavory backgrounds) simply does not appear upon any reasonable viewing of the work. That Szep composed the cartoon without knowing what the plaintiff knew about his appointees is immaterial since the cartoon cannot reasonably be interpreted as depicting what the plaintiff knew and when he knew it.

7. *The January 10, 1980, Robert Turner Column*[19]
(Counts V and VI)

The alleged defamatory article appeared in Turner's regularly featured column entitled "Political Circuit" under Turner's by-line. The column contained a mock, though realistic-appearing, press release purportedly issued by Governor King in which he discusses in detail his problems with his recently resigned press secretary, Ronald Brinn, and with the press generally; and in which he announces his own appointment as his new press secretary.

Use of the technique of satire does not alter the analysis set out in the preceding sections of this Memorandum. The threshold inquiry remains "whether the communication in question could reasonably be understood in a defamatory sense by those who received it." *Polygram Records* v. *Superior Court*,

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[19] The full text of this column is attached to this Memorandum as Appendix "E".

216 Cal. Rptr. 252, 259 (Cal. App. 1985). "The particular style of writing involved is part of the 'context' to be examined when determining whether the statement could reasonably be understood as an assertion of fact." *Lane* v. *Arkansas Valley Publishing*, 9 Media L. Rep. 1726, 1728 (Colo. Ct. App. 1982). As with other forms of writing, if a satirical writing reasonably implies "the assertion of a factual charge that would be defamatory if made expressly," Restatement (Second) of Torts § 566 Comment d, it is protected by the cloak of constitutional privilege. *Pring* v. *Penthouse International, Ltd.*, 695 F.2d 438 (10th Cir. 1982); *Lane* v. *Arkansas Valley Publishing, supra*. On the other hand, a statement that is "obvious satire" cannot reasonably be susceptible of a libelous meaning. *Moreno* v. *Time, Inc.*, 11 Media L. Rep. 2196, 2199 (NY Sup. Ct. 1985); *Salomone* v. *Macmillan Pub. Co., Inc.*, 411 N.Y.S. 2d 105 (1978).

The plaintiff complains that he never issued the press release attributed to him or made any of the statements contained therein. Of course, he did not. Further, he argues that, since Turner admits the falsity of the attributions made in his simulated press release, the statements as a result must be factual, since opinions cannot by definition be proven false. I do not agree with this argument. The attempt to prove logically that the article as a whole and in its segments constitutes fact rather than opinion is strained because it fails to appreciate that the article must be examined "in its totality in the context in which it was . . . published." *Myers* v. *Boston Magazine Co., Inc.*, 380 Mass. 336, 341 (1980). In *Lane* v. *Arkansas Valley Publishing, supra*, the newspaper's column purported to quote from a letter attributed to the plaintiff in that case, a controversial county commissioner. The letter, a satirical piece authored by the columnist, referred to a new, military-type county personnel code and to an incident involving "secret meetings" (both topics had been the subject of extensive public con-

troversy), and was purportedly signed by the plaintiff commissioner as "Supreme Commander." The *Lane* court held:

> Taken out of context, the article appears to assert that [the plaintiff] was the author of such a letter. Although admittedly false, that in itself is not actionable libel because the context of the letter must be considered to determine whether it may reasonably be understood to imply the assertion of fact. As with *Myers* v. *Boston Magazine Co., Inc.* . . ., the format and language indicates the letter was a tongue-in-cheek effort to portray the author's opinion of [the plaintiff's] personnel policies and conduct of office. The factual basis for the opinion is disclosed in the article.

Id. at 1729. The court affirmed the entry of summary judgment with respect to that article.

The context of Turner's satirical column here makes clear that it could not reasonably be understood to imply the assertion of fact. An ordinary reader would immediately notice that the column appears under the title of Turner's feature column ("Political Circuit") and under Turner's by-line, both of which suggest that the following "press release" was not actually a press release, as that term is commonly understood. The column was published on the Op-Ed page, a page devoted to syndicated, featured, and freelance articles covering a broad spectrum of subjects, rather than among news reports. An unwary reader would be alerted to the sarcastic nature of the "press release" upon reading its opening two words — "Good riddance" — and would certainly be disabused of any lingering tendency to read the column literally upon encountering the contents of the "press release" as it develops. There is surely at least a whiff of the ridiculous about the "press release" which would arouse in the reader "a measure of scepticism

and an expectation of amusement." *Myers, supra* at 342. As with the attributed letter in *Lane, supra* the tongue-in-cheek and sometimes droll quality of Turner's article, emerging from the language, format, and tone he employs, clearly serves to express his *opinion* that the plaintiff himself was responsible for his own perceived poor press relations. In this light, the column could not reasonably be understood to present factually the press release as the plaintiff's own product.[20]

The plaintiff asserts that Turner's reputation as a political writer rather than as a satirist or humorist, considered with the placement of the column on the Op-Ed page rather than on a page devoted to comics or humorous articles, assists in creating a context in which a reader would understand the "press release" to be real. I must disagree. Turner's reputation as a political columnist is not so ironclad as to preclude him professionally from placing his tongue squarely in his cheek on occasion. Although some may quarrel with the effectiveness of his satirical style or with the deftness of his touch, such criticism does not raise actionable claims. *Polygram Records* v. *Superior Court, supra* at 258-259; *Miller* v. *Charlestown Gazette, supra* at 2544-2545. One need not be a humorist, nor have the reputation of a humorist, nor even be particularly amusing, to publish one's opinions in a humorous or satirical form. As to the plaintiff's second contention, perhaps placement of the Turner column on the comics page would have made its satirical nature more obvious. On the other hand, perhaps not. The satire was clear enough on the Op-Ed page.[21]

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[20] The editorial use of the fictitious press release or letter in a political context is not restricted to Turner. By coincidence, on January 29, 1986, in the publication "News West", the columnist James Kerasiotes authored an imagined letter from "The Dukakis Committee", which is reproduced as Appendix "F". No reasonable reader of News West would consider that the supposed letter was factual.

[21] Even a casual reader of Op-Ed pages notices that writers such as Art Buchwald, Andy Rooney and others well known for their humorous and satirical pieces, have often, if not customarily, been found on those pages.

For the foregoing reasons, I conclude that an ordinary reader must find that the Turner article was an expression of pure opinion. Therefore, the article is not actionable.

8. *The Farrell Articles.*

A. *The November 8, 1981, Farrell Article*[22]

(Counts I and II)

These counts of the Complaint focus on the first paragraph of a column written by defendant Farrell and published by the Globe on November 8, 1981. The article largely concerns political decisions made by the plaintiff regarding liquor legislation and other matters. The article is captioned:

"*Liquor Legislation*
ED KING'S PROMISES
NOT MONEY IN BANK."

Above the caption is a photograph of the plaintiff bearing the caption "Gov. Edward J. King", and to the picture's immediate left a box which reads:

> Fred Martignetti and other proponents of the Primary Source liquor bill now have learned what others before them have discovered to their consternation: that Ed King's promises carry no ironclad guarantees.

Drawing from the Governor's decision-making in these instances, in the last paragraph of the 23-paragraph article, the author critizes him for demonstrating a "condescending attitude [that] never was more in evidence than in October when King called a judge and demanded that he change a decision he had rendered in a gang-rape case." The case is not mentioned in any of the preceding paragraphs.

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[22] A copy of this column is attached to this Memorandum as Appendix "G".

In the criminal case mentioned by Farrell, five men had pleaded guilty in Norfolk Superior Court to charges of rape, unnatural rape, and malicious destruction of property, and were subsequently sentenced by Associate Justice Herbert B. Abrams of the Superior Court. The Governor took numerous steps to express publicly his disapproval of the sentence imposed, included hosting a talk show during which he expressed his concern with the sentences; holding a press conference at which the matter was discussed; distributing an official statement; releasing a copy to the press of a letter he had written to the Chief Justice of the Superior Court[23] about the matter; announcing his intent to file related sentencing legislation; and releasing a copy of a letter he had written to the Judicial Conduct Commission with respect to Judge Abram's conduct in imposing sentence.

In the pre-trial proceedings Farrell asserts that he was informally told about the alleged call to Judge Abrams by State Treasurer Robert Q. Crane. Crane, when deposed, agreed that he had told Farrell, but had no recollection of his *own* source of the information. The plaintiff denies ever having made the call; and in his deposition Judge Abrams categorically denied having received any such call from the Governor or any one on his behalf. There is no other evidence indicating that the call was ever made.

The challenged final paragraph follows immediately upon a paragraph which states:

> It has taken some political figures a long time to realize that King operates on a one-way street and regards all other state officials — duly elected officers, elected legis-

[23] I was the Chief Justice of the Superior Court at the time of these events. The parties have stipulated that my marginal involvement in the matter is no impediment to my accepting a special assignment in this case; and have specifically agreed that I might sit herein.

> lators, judges and other members of the judiciary — as subordinates of the executive, with their principal function to serve him, the master. (underscoring supplied).

Then follows what Farrell expresses as evidence of such attitude:

> That condescending attitude never was more in evidence than in October when King called a judge and demanded that he change a decision he had ordered in a gang-rape case. The judge acquiesced and proved two things: 1) King's original appointment of him was a colossal blunder. 2) He is unfit to remain on the bench.

The very heart of a libel suit is the injury that false words can cause to a person's reputation. A libelous statement consists of "written words which would tend to hold the plaintiff up to scorn, hatred, ridicule, or contempt, in the minds of any considerable and respectable segment in the community." *Stone* v. *Essex County Newspapers, Inc.*, 367 Mass. 849, 853 (1975). That a plaintiff finds a statement unpleasant and offensive is not enough, since defamation necessarily involves the idea of disgrace. Prosser and Keeton, Law of Torts 773 (5th ed. 1985). It is for the court in the first instance to determine whether a statement is capable of a defamatory meaning. Restatement (Second) of Torts § 614 (1977); Prosser and Keeton, Law of Torts 774 (5th ed. 1985). If the words are incapable as a matter of law of a defamatory meaning, the court must dismiss the complaint. See *Borski* v. *Kochanowski*, 3 Mass. App. Ct. 269 (1975). If a publication is susceptible of both defamatory and harmless meanings it presents a question for the jury which of the meanings were so understood. *Smith* v. *Suburban Restaurants, Inc.*, 374 Mass. 528, 530 (1978). Finally, a publisher may be liable for the implications of a par-

ticular statement, and not just for its literal meaning. ("Implication" has been defined by one commentator as the understanding which the average reader may be expected to draw from the face of the communication alone. See Sack, Libel, Slander, and Related Problems § II. 4.3. at 50 [Practicing Law Institute, 1980]).

Placed within the context of the entire article, the statement complained of in Counts I and II functions as a disclosed fact upon which Farrell (in part) based his expressed opinion that the plaintiff demonstrated a "condescending attitude." The Restatement sets forth a fact pattern regarding the expression of opinion which is relevant here: "(1) If the defendant bases his expression of a derogatory opinion of the plaintiff on his own statement of false and derogatory facts, he is subject to liability for the factual statement but not for the expression of opinion." Restatement (Second) of Torts § 566, comment c at 175 (1977). In *Fleming* v. *Benzaquin*, 390 Mass. 175 (1983), the Supreme Judicial Court referred to this example to underscore the requirement that the plantiff prove that the disclosed fact is "both false and defamatory". Even though the fact may be demonstrably false, there can be no liability if the fact is not also defamatory.

The defendants concede for purposes of this motion the falsity of the statement that the plaintiff called and exerted pressure upon Judge Abrams, but maintain that the statement is not defamatory. The plaintiff, on the other hand, maintains that the statement charges him with engaging in "unheard of conduct involving a private communication with a judge by a Governor", Plaintiff's Memorandum of Law and Fact, p. 152, amounting possibly to violations of law. For the reasons set forth, I conclude that there is no perceptible defamatory aspect in the erroneous statement, and therefore, I grant summary judgment dismissing these counts of the complaint.

Farrell's statement does not charge the plaintiff with the commission of a crime.[24] The general test for libel, however, is much broader than simply whether a crime or wrongdoing has been imputed to the plaintiff. *Stone* v. *Essex County Newspapers, supra* at 853. To this effect, the plaintiff contends that the defamatory impact of the statement lies in its suggestions that his alleged actions "far exceeded the proper scope of his powers of office and constituted an abuse of his powers and an impermissible interference with the operation of the judicial system." Plaintiff's Memorandum of Law and Fact, p. 153. The article obviously does not say this explicitly. If such a charge is present, it must be in the form of an implication that an average reader could expectedly draw from the article.

It is a familiar principle of construction that allegedly defamatory words must be given their plain and ordinary meanings in the full context in which they occur. "The meaning of a communication is that which the recipient correctly, or mistakenly but reasonably, understands that it was intended to express." Restatement (Second) of Torts § 563 (1977). Here, the challenged statement was published approximately one month after Judge Abrams' highly publicized sentencing decision. The plaintiff himself stepped to the forefront of the debate surrounding that decision, forcefully identifying himself with those who were critical of the sentence. It is highly unlikely that an average reader, when considering the proprieties of the plaintiff's reported actions, would judiciously distinguish between the numerous, highly visible actions taken by the plaintiff and the single action falsely attributed to him. The defamatory construction the plaintiff puts upon the words is not the construction an average reader would put upon them in the

[24] Obstruction of justice has not been recognized in Massachusetts as a common law crime. See *Commonwealth* v. *Devlin*, 366 Mass. 132, 138 (1974). No allegation of bribery or extortion can be made out on the facts stated by Farrell. Plaintiff's Complaint, pp. 7, 15.

context of both the whole article and the state of public opinion at that time. Moreover, it is no more likely that the reader would regard a governor's call to a judge to complain about an unpopular and controversial decision as reflecting disgrace upon the governor. This seems especially true where, as here, the plaintiff vigorously undertook a public course of action for which such a call would be a logical (if unsuitable) culmination.

Farrell's inaccurate statement, thus viewed, simply cannot be seen as bearing the meaning which the plaintiff sets forth. Even though the statement is accepted as false, it bears an unambiguous meaning which could not expose the plaintiff to the hatred, ridicule, and contempt of the community which is a necessary predicate to a libel action. For this reason alone, the statement is not actionable. Nonetheless, even were I to assume that there is sufficient evidence of the defamatory tendencies of the statement, I would be constrained to dismiss the counts on the other threshold issue of actual malice.

The plaintiff is entitled to establish actual malice (a subjective matter) by reasonable inferences of malice drawn from objective evidence. *Stone* v. *Essex County Newspapers,* 367 Mass. 849, 868 (1975). "A major basis for inferring actual malice involves examination of the sources used by a reporter." *Lyons* v. *New Mass Media,* 390 Mass. 51, 57 (1983). Actual malice may be found where there are obvious reasons to doubt the veracity of the informant or the accuracy of his report. *St. Amant* v. *Thompson,* 390 U.S. 727, 732 (1968). Considering the evidence with an indulgence in this favor, *NAGE* v. *Central Broadcasting Corp.,* 379 Mass. 220, 231 (1979), the plaintiff is entitled to a jury trial if there is some indication from which an inference of actual malice could reasonably be drawn. He maintains that reasonable inferences could be drawn that would (1) establish that no source existed at all for Farrell's statement; and (2) establish alternatively that Farrell's failure to conduct

an investigation of Crane's statement and his "machinations concerning Crane's confidentiality" constitute direct evidence of actual malice. I am unpersuaded that the evidence to which he points creates a triable issue.

First, the evidence underscored by the plaintiff does not support his contention that no source existed for the challenged statement. He refers to various depositional statements in the record to support his theory, but his reading of the statements is, at best, strained.[25] The mere existence of a dispute over material facts to be inferred does not preclude summary judgment. The dispute must be *genuine*, i.e., the inferences adverse to the moving party must be sufficiently plausible that they could reasonably be drawn by a jury. Based upon suspicion and surmise rather than upon hard factual evidence, the inferences asserted here are not sufficiently plausible to create a triable issue.

The plaintiff also argues that a dispute exists as to whether the defendants published the erroneous information supplied by Crane despite serious doubts as to its veracity. The direct evidence of actual malice on this point is Farrell's claimed failure to investigate or verify the statement. It is well settled that a reporter's failure to investigate does not in and of itself establish bad faith. *St. Amant* v. *Thompson, supra* at 733. "As

[25] For example, the plaintiff focuses upon Crane's explanation that he delayed identifying himself as the source because he "didn't want to be the source of this" (Crane Deposition, p. 79), as evidence that Crane never was the source. Crane's explanation for at last coming forward ("Mr. Farrell had already listed me as the source . . ") proves, the plaintiff contends, that Crane "had been forced to state he was the source." Plaintiff's Memorandum, p. 191. Similarly, when the plaintiff's counsel confronted Crane at his deposition with the "no source" theory, Crane responded, "I think you're certainly entitled to your opinions." The plaintiff construes this response as a refusal to deny the theory, thereby negatively affirming it. A similar gloss is placed upon Farrell's long acquaintance with Crane, upon Michael Janeway's lack of surprise upon learning that Crane had stepped forth as the source, and upon Farrell's termination of employment.

long as the sources of the libelous information appeared reliable, and the defendant had no doubts about its accuracy, the courts have held the evidence of malice insufficient to support a jury verdict." *Ryan* v. *Brooks,* 634 F.2d 726, 734 (4th Cir. 1980). See *Curran* v. *Philadelphia Newspapers, Inc.,* 432 A.2d 652 (Pa. 1981); *Hall* v. *Rogers,* 390 A.2d 502 (RI 1985). By contrast, where a defendant fails to investigate in the face of affirmative evidence of falsehood and inaccuracy, or knowing of the inherent unreliability of a source, a sufficient showing may be made to reach a jury regarding the defendant's recklessness in publishing the falsehood. Here, Farrell received the information from an individual who was a highly-placed public official, personally acquainted with both Farrell and the plaintiff, and whose past honesty is unquestioned by the parties. Thus, the evidence establishes that Crane was a reliable source of information. The information provided was not "so inherently improbable that only a reckless man would have put [it] in circulation." *St. Amant* at 731. Absent "obvious reasons to doubt the veracity of the informant or the accuracy of the reports," *id.,* it cannot be said that Farrell entertained the requisite doubt central to a finding of reckless disregard of truth or falsity.

Other evidence adduced by the plaintiff from which malice might be inferred does not aid his case. (1) Reasoning from the evidence regarding Merkert Industries[26] to a finding of

[26] Considered in favor of the plaintiff, the evidence shows that Farrell received compensation from Merkert Industries for consulting work or, as characterized by editor Janeway, "public relations work". Viewed as compromising the Globe's and Farrell's journalistic integrity, this outside work resulted in Farrell's discharge from employment with the Globe. Other Globe employees had not been discharged for similar infractions. Notably, Crane sat on the Board of Directors of Merkert Industries and was professionally associated with Mr. Merkert. In this tangled web of professional contacts (more fully set forth in the Plaintiff's Memorandum, pp. 45-55) the plaintiff finds shadowy inferences of actual malice lurking. Discovery is complete, and the details which the plaintiff has carefully combed from the extensive discovery materials still do not bear upon the issue at hand.

actual malice involves a degree of hazy speculation that no longer has a place at this stage of the litigation. (2) Crane's opinion that Farrell "doesn't write anything good about [the plaintiff]" is not evidence of Farrell's actual malice. (3) Farrell's recognition that Crane "makes mistakes occasionally and is not infallible" does not convert Crane into an unreliable source whose statements cannot be published without peril. (4) Farrell's "machinations concerning the alleged existence of confidentiality" do not constitute direct evidence of actual malice, as the plaintiff contends. Indeed, the likelihood (or unlikelihood) that Farrell entertained "serious doubts" as to the truth of Crane's statement does not seem greater, lesser, or at all different in light of such evidence.

B. *The November 22, 1981, Farrell Column*[27]
(Counts III and IV)

On November 22, 1981, the Globe published an article by Farrell about the plaintiff's business relationship with one David R. Thissen. The article is headed:

"*State Politics*
MISSING VIP"

The article deals primarily with David R. Thissen and the plantiff's longtime friendship with him. It is captioned "Missing VIP", referring to Thissen's absence from a fundraising cruise. Thissen's picture appears. The material which the plaintiff asserts is defamatory of him is found in the ninth paragraph, and involves reference to one Edward Keelan, as an example of the plaintiff's "personal loyalty" toward associates, as follows:

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[27] A copy of this column is attached to this Memorandum as Appendix "H".

> The governor has never run away from Thissen, even in the face of strong recommendations by Hanley et al that he would be better off putting some distance between himself and Thissen. This personal loyalty King manifests towards associates never was more apparent than during the recent in-fighting over a satisfactory racing bill for the industry. Despite his close association with out-of-state dog racing promoter Eddie Keelan, King has made no secret of his efforts to do Keelan's bidding on the legislation that would greatly benefit the harness track at Foxborough owned by Keelan and his partners.

The article then reverts to further discussion of Thissen in the remaining nine paragraphs.

In this paragraph midway through the article discussing the plaintiff's "personal loyalty . . . toward [his] associates", Farrell thus stated that the plaintiff as Governor "has made no secret of his efforts to do [dog racing promoter Eddie] Keelan's bidding on the legislation that would greatly benefit the harness track at Foxborough owned by Keeland and his partners." The legislation referred to is a racing bill which passed the Legislature in the Fall of 1981, but which the plaintiff as Governor refused to sign as passed. That bill gave the Raynham dog track additional racing dates which competed with the schedule of the harness track at Foxborough. The plaintiff as Governor predicated his approval upon three amendments, one of which would have aided the track at Foxborough by preserving certain dates free of competition from the nearby Raynham and Taunton tracks.

Both the plaintiff and his wife have had business and social relationships with Keelan dating back through the 1970's; and Keelan had contributed to his gubernatorial campaign. Farrell, on the other hand, is a friend and business associate of one George Carney, a part owner of the race track in Raynham.

Again, it is for the court to determine initially whether an allegedly defamatory statement taken in its natural sense can be understood as stating a fact. *Myers, supra* at 339. Examining the totality of the circumstances is essential to determine whether the reader would have treated the statement as opinion. *Henry* v. *Halliburton,* 690 S.W.2d 775, 788 (Mo. 1985); *Myers, supra* at 342-343. Moreover, what constitutes a statement of fact in one context may be treated as a statement of opinion in another, in light of the nature and content of the communication taken as a whole. *Cole* v. *Westinghouse Broadcasting Co., supra* at 310. With these principles in mind, I conclude that the section of Farrell's article complained of cannot be understood as fact and, indeed, is constitutionally protected as opinion.

The gist of the plaintiff's complaint is that the defendants falsely stated that he, in doing the "bidding" of a business associate regarding the racetrack legislation, was involved in an unlawful conflict of interest. Whether carefully or cursorily read, the article in its relevant aspect concerns the plantiff's "personal loyalty" to associates even when conventional political wisdom (or indeed the public good) would seem to require setting loyalties aside. The implication that the plaintiff was motivated by personal loyalties and perhaps self-interest rather than the public good in pursuing particular legislation is well within the scope of protected expression of speech enjoyed by a free press. It is vital to our form of government that press and citizens alike be free to discuss and, if they see fit, impugn the motives of public officials. *Janklow* v. *Newsweek, Inc.,* — F.2d — (8th Cir. 1986). As I have noted above with regard to the "billboard" editorial, a journalist's commentary on a public official's business, social, or political affiliations and how those affiliations seem reflected in decision-making has a vital place in open public discourse. "[S]hort of accusation of crime or personal dishonesty, the First Amendment protects even sharp attacks on the character, motives, or moral qualifi-

cations of a public officer . . ." *Okun* v. *Superior Court,* 629 P.2d 1369, 1374 (Cal. 1981).

The plaintiff contends, however, that more than his motives in fashioning the racetrack legislation are under Farrell's attack; and that Farrell has taken the extra step of accusing him of specific wrongful conduct, viz., that he received benefits of value in return for carrying out Keelan's bidding. As he correctly states, "Accusations of criminal activity, even in the form of opinion, are not constitutionally protected . . .". *Cianci* v. *New Times Publishing Co.,* 639 F.2d 54, 63 (2d Cir. 1980). The flaw in his argument, however, is the added freight interpolated upon the word "bidding". Would an ordinary reader understand that word in this context to refer to, or imply, the hard fact of a bribe or of extortion or of a corrupt exchange of benefits for value? I think not. The word itself (or, for that matter, the sentence segment "efforts to do Keelan's bidding") is not a direct accusation of unlawful activity. See *Janklow* v. *Newsweek, Inc.,* — F.2d — (8th Cir. 1986). Standing alone, it is too imprecise and colloquial to be considered actionable as a defamation. Furthermore, consideration of its context negatives the meaning the plaintiff would have it carry. In an article partyly about the relationship between public image and personal loyalty, the vague assertion that the plaintiff made efforts to do another's bidding could not reasonably amount to a factual assertion of a crime. See, e.g., *Anton* v. *St. Louis Suburban Newspapers, Inc.,* 598 S.W.2d 493 (Mo. App. 1980) (remark that lawyer engaged in "sleazy dealings" an expression of opinion); *Good Government Group of Seal Beach, Inc.* v. *Superior Court,* 22 Ca.3d 672 (1978) (charging "chicanery and machinations" not actionable, whereas charging extortion of $100,000 by blackmail is actionable); *Henry* v. *Halliburton, supra* (description of public figure as a "fraud" who "fleeced a consumer . . . for personal gain" too broad and unfocused to be an accusation of specific crime). Cf. *Lyons* v. *New Mass Media,* 390 Mass. 51 (1983) (charges that union official has

"family members on the payroll" and that he passed "confidential information to city officials" were statements of fact). The thrust of this second Farrell article is that the plaintiff as Governor was inclined to ignore political liabilities in favor of personal loyalties and *and* that on one occasion he acted unlawfully in observing those loyalties. In light of both the content and context of this alleged defamation, the construction urged is forced and strained. The statement is an opinion fully deserving of constitutional protection.

The plaintiff does not rest here, however, but further argues that Farrell's opinion is actionable because it is based on undisclosed defamatory facts. In this view, Farrell based the statement "King made no secret of his efforts to do Keelan's bidding" upon the fact that Keelan was often around the State House and met with the plaintiff on Saturdays. Granting that these facts were undisclosed, and assuming they are false, I do not see how they can be regarded as defamatory. On the other hand, the assertion that the plaintiff and Keelan had a "close association" was based on information publicly available and does not imply undisclosed defamatory facts.

Finally, even if the challenged statements were comprised of factual materials, my careful review of the available evidence satisfies me that the plaintiff would be unable to prove, and has not presently sufficiently demonstrated, that Farrell published these statements with actual malice. Briefly considering the plaintiff's arguments, and bearing in mind the Supreme Court's guidance in *St. Amant* v. *Thompson,* I note the following:

(1) That Farrell wrote that the legislation "would greatly benefit" rather than "would have greatly benefitted" Keelan does not add to the plaintiff's case. The same is true of Farrell's use of the phrase "close association" rather than "business association". In recently considering a similar argument, the Eighth Circuit opined, "[T]he First Amendment cautions courts

against intruding too closely into questions of editorial judgment, such as the choice of specific words. Editors' grilling of reporters on word choice is a necessary aggravation. But when courts do it, there is a chilling effect on the exercise of First Amendment rights." *Janklow* v. *Newswseek, Inc.*, — F.2d —, — (8th Cir. 1986).

(2) Farrell's reliance on Frank Rich, a political adversary of the plaintiff's, does not manifest actual malice since Farrell's statements are based on conversations with numerous individuals. Rich's contribution as a source does not taint Farrell's information or cast doubt upon what he believed to be true.[28]

(3) Evidence suggesting that Farrell was in a certain sense doing Carney's "bidding" is of a highly dubious quality. Likewise, Farrell's own notes reflecting his understanding of who benefitted from the plaintiff's planned racing legislation fall far short of the kind of evidentiary display that would necessitate a jury trial. Evidence in the form of ten-year old barroom political gossip (offered second-hand) and a reporter's hastily scribbled notes is far too insubstantial to educate this court, or any reasonable jury, as to the presence of actual malice on Farrell's part.

For these reasons, summary judgment is in order dismissing these counts of the plaintiff's Complaint.

9. *Conclusion*

(1.) Public officials (particularly *elected* public officials in the highest echelons of government) enjoy many benefits of office. They are clothed with sweeping powers and recognition far beyond the reach of the average citizen. They attract the support, adulation and loyalty of many before, during, and after holding office. But with the benefits of office go its

[28] For this reason, it is unnecessary for this court to inquire whether Rich's "estranged relationship" with his son should have caused Farrell to doubt Rich's information, or whether Farrell had any obligation to investigate the Capitol Police log.

burdens, including the continual interest and unremitting scrutiny of the media. They must expect criticism along with praise. Often that criticism may seem to the elected official to be unwarranted, unpleasant, inaccurate, irrational, illogical, adamantly doctrinaire, and totally incorrect. Often if appears to be — and sometimes is — much more: caustic, arrogant, harsh, acerbic, insulting, intemperate, carping, abusive, persecutive, mean, spiteful, vehement, vindictive, vituperative and oppressive. Often the elected official must withstand a veritable drumbeat of biting criticism by the media of his or her performance in office; and that criticism can be very sharp, stinging and hurtful, not only personally but in particular to the official's family. But, only our system of government and particularly under the precepts of the First Amendment, in the interest of uninhibited, robust, and wide-open debate, the elected public official is expected to able to withstand[29] even the most virulent criticism and complaint, so long as it is made within prescribed constitutional boundaries, i.e. no legal redress by the public official against the publisher for defamation unless the publication is made with "actual malice" — that is, knowing falsity or reckless disregard for truth or falsity. Such is the current state of constitutional law in this area. The rights of a free press, "while lodged in the reporter and his publisher, in reality repeat an underlying interest of the public." *Bruno & Stillman, Inc.* v. *Globe Newspaper Co.*, 633 F.2d 583, 595 n.12 (1st Cir. 1980). The First Amendment, as currently interpreted, requires that "we protect some falsehood in order to protect speech that matters". *Gertz* v. *Robert Welch, Inc.*, 418 U.S. 323, 341 (1974). "When the speech is of public concern and the plantiff is a public official, the Constitution clearly requires

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[29] Harry S. Truman, perhaps, best epitomized the remedy for the super-sensitive in politics, "If you can't stand the heat, don't go in the kitchen" (as quoted in *Silsdorf* v. *Levine*, 447 NYS 2d 936, 939 [1982]).

the plaintiff to surmount a much higher barrier before recovering damages from a media defendant than is raised by the common law." *Phildelphia Newspapers, Inc.* v. *Hepps*, — U.S. — (Slip opinion, April 21, 1986).

Thus, no matter how much a motion judge may empathize[26] with one who is the target of a fusillade of critical comments, editorials, and cartoons which no doubt appear to such a sensitive public official to be one-sided, mean-spirited and excessive, nevertheless, in the final analysis, the overall public interest in the protection of a vibrant and free press (granting its occasional excesses) mandates that the public official's libel claims be examined with the extreme judicial circumspection. Relief may be accorded to such a public official only if that person clearly comes within the narrow boundaries limned by *Times* v. *Sullivan* and its progeny. In my considered opinion none of the plaintiff's claims here meets that stringent test, under currently declared constitutional principles. It follows that the several defendants are entitled to summary judgment.

(2.) A summary judgment shall enter forthwith DISMISSING each of the twelve counts of the plaintiff's Amended Complaint.

So ordered.

James P. Lynch, Jr.
Justice of the Superior Court

Dated: April 30, 1986

[26] Judges, as well as other officials, are from time to time the recipients of what they consider to be grossly unfair treatment in the media. While the public official, by virtue of his or her public position, usually has a forum to counter-attack, by contrast the judge under media attack is constrained to suffer in silence.

Appendix "A"

COMMMONWEALTH OF MASSSACHUSETTS

SUFFOLK, ss. SUPERIOR COURT
CIVIL ACTION
No. 52488

EDWARD J. KING

vs.

GLOBE NEWSPAPER COMPANY & others

DEPOSITIONS

DATE FILED IN COURT	NAME OF DEPONENT	VOLUMES
May 24, 1982	Francis P. Rich	1 Volume
July 28, 1982	Robert L. Turner	2 Volumes
August 12, 1982 January 17, 1984	David J. Farrell	4 Volumes
August 13, 1982	Paul Szep	1 Volume
August 13, 1982	Michael Kenney	1 Volume
August 13, 1982	Anne Wyman	1 Volume
November 30, 1982	Philip J. Aube	1 Volume
July 16, 1984	Edward J. Keelan	1 Volume
December 10, 1985 January 17, 1986	David J. Farrell	4 Volumes
December 17, 1985	Robert Q. Crane	1 Volume
December 27, 1985	Robert E. Hughes	1 Volume
January 1, 1986	Herbert Abrams	1 Volume
January 13, 1986	Ben Bradlee	1 Volume

January 14, 1986	Edward J. King	4 Volumes
January 17, 1986		
February 25, 1986	Kathryn Tolbert Dohner	1 Volume
February 27, 1986	Martin Nolan	1 Volume
March 7, 1986	George L. Carney	2 Volumes
March 18, 1986	Edward J. Hanley	1 Volume
March 28, 1986	Ronald Brinn	1 Volume

Appendix B.

". . . the appointment and forced resignation of Stephen Guptill, the appointment and forced resignation of Stephen Clifford, the apointment and forced resignation of Thomas DiSilva, the appointment and forced resignation of John Haggerty, the appointment and forced resignation of Barry Locke . . ."

Appendix C.

"SO LET US PREY!"

Appendix D.

The old billboard game

Sooner or later, there just had to be the sniff of a billboard scandal. And now there is one and it brings back those good old days when the lobbyist was king and there were always goodies for his pals in the Legislature.

During 10 years that may someday be labeled Massachusetts' "good government decade," the billboard industry has been on the run. Local communities that decided they'd been captive long enough to 672 square-foot huckstering found that state agencies and the courts were backing them up when they moved to get offending signs removed. Some legislators even discovered they could get along without a free lunch or a free billboard just before election time.

It was not that the billboard industry had folded up its barker's stand; it fought every attempt to regulate its excesses and spent a lot of money on lawyers and lobbyists. Yet, while there are still some 1000 billboards standing in violation of local, state, or federal regulations, they have been coming down from the places where people did not want them.

But now, in the space of barely a year, the tide has turned — not because people and local officials got up and objected, demanding that the billboards be put back up, but apparently, as The Globe's Spotlight Team has detailed, because industry money finally reached what must be the right places.

One year ago last August the locally-owned Donnelly Advertising Co., the state's major billboard advertising firm, was bought out for $9 million by Ackerley Communications, one of the nation's largest billboard firms. Ackerley signed up former House Speaker Robert H. Quinn to do its lobbying at the State House. Then, just before the September primary,

seven of its executives (and their friends and relatives) discovered Edward J. King, at the time just an underdog candidate for governor, and dropped $7000 into his campaign treasury.

And back out of the Beacon Hill closet come all the old games. A bill zips through the Legislature and into law with King's signature to allow a ski resort billboard to remain despite a court order. King's transportation secretary and close adviser Barry Locke moves to block the removal of 95 billboards that violate the federal highway beautification law. And to top it off — for now, anyway — the administration starts talking about weakening the powers of the watchdog Outdoor Advertising Board.

Meanwhile, the industry is apparently posting or enlarging signs without permits, and providing free billboard space — either knowingly or by a very expensive oversight — to Boston mayoral candidate David Finnegan who just happens to be brother of the House Ways and Means chairman.

And why? Because billboard advertising is a big bucks industry but, curiously, an industry with not much of a constituency and, despite the piteous claims of its State House supporters, with no more than 400 employees at present, according to an industry source.

Those factors prompted the billboard industry to act as it did in the past and the way it apparently will continue to operate until it can be compelled to obey the wishes of local communities and the standards set by local, state, and federal regulations. It will be a hard game to win in a tough league, but the victory will be worth it.

Appendix D.

"ACKERLEY BILLBOARDS CAN PUT MONEY IN YOUR POCKETS TOO!"
LOCKE
ACKERLEY

Appendix E.

There's a new 'can-do' man in charge

NEWS RELEASE
To: The State House press
Date: Jan. 9, 1980
From: Gov. Edward J. King
Contact: Gov. Edward J. King

Following is a statement from Gov. Edward J. King on the departure of his press secretary, Ronald C. Brinn.

"Good riddance.

"With Ron Brinn out of the administration, the big roadblock is removed. Now I'll be able to get my message out to the people and pal around with reporters the way I tried to all last year. But Ron kept getting in the way.

"Clearly, I could have made the $500 million property tax rollback if Ron had only performed up to par. And talk about patronage! Ron was the one who insisted that I hire Guptill and Clifford and Haggerty and DiSilva and Foster. And now the MBTA's a big headache and Ron's no help — he's a Navy man.

"Ron, in fact, was the hard-boiled grinch who told me to cut off funds to the Pine Street Inn a week before Christmas.

"Clearly, we don't have to look very far to find out why my ratings have been plummeting in the polls. The substance has been terrific; Ron just didn't communicate the image.

"And let's not have any more talk about poor communication between Ron and me, either. It was Ron who insisted last spring that he move his offices down to the nether reaches of the State House — about three bus stops and an elevator ride from me. Ron felt he had been getting too close.

"If Ron wasn't well informed about administration activities, it's not my fault. I told him to read the papers. Somebody in this administration ought to read the papers.

"While we're on bad communications, let's get one thing straight. For all his faults, I didn't fire Ron, or even 'displace' him, as he said. I offered him a perfectly good job handing out press releases in the Saltonstall Building someplace.

"All these months, I've been dying to get friendly with the press, but Ron kept shouldering me aside, wanting the spotlight for himself.

"And people got the wrong idea. When Ron jumped out there to deal with the Guptill and Clifford firings and to face the demonstration of shouting welfare mothers, people thought I was cowering in my office and had fed Ron to the wolves. Actually I was champing at the bit to demonstrate my 'can-do' approach to problem-solving.

"For the sake of accuracy, I must reveal this: Ron is the one with the taste for lobster salad — and tail meat only, please. The Globe smeared me terribly with that picture of a nice, big lobster on Page One. I wanted to talk to the public, to tell the taxpayers the truth — that when they paid $260 for dinner for me and a trooper and Tommy McGee and his wife and his son, it wasn't lobster at all. It was only cold cuts that cost $52 per person.

"I should have learned my lesson early. Marty Burke, my press secretary during the campaign, seemed to be working out until he actually started talking to reporters. Naturally, I had to get rid of him. I tried to set both Marty and Ron straight by embarrassing them in public, but it didn't work.

"Ron turned out to be a big mistake. When I brought him over from MassPort, the most he'd ever done was coordinate press activities at Logan Airport when a DC-9 smashed into the sea wall there. He'd never worked a real disaster.

"Now things will be different. From now on, Ed King will have the best PR man in the business: Ed King."

For a recorded actuality of Gov. Edward J. King reading this press release, call "Dial-a-Governor" — 1-800-632-8222.

Robert L. Turner is a Globe political columnist.

Appendix F.

Kindly disregard our last letter

Former Governor Edward King's announcement that he would not run again in 1986 was front page news last Friday. Just moments after reading one newspaper's account of King's press conference I began looking through the stack of morning mail. On top, was a fundraising letter from the Dukakis committee. The letter, signed by Senator Edward Kennedy, made a strong appeal for financial support to defeat the massively financial radical right-wing and its candidate for Governor, Ed King. Below is the text of a letter I expect will be showing up in my mailbox any time now.

FROM: THE DUKAKIS COMMITTEE
TO: JAMES KERASIOTES

Dear James:

Last Friday you received a copy of the Massachusetts Success Story — which demonstrates the achievements of Mike Dukakis since his return to the State House in 1982. This is the third copy (and the third fund-raising solicitation) we've sent you this year. Our records do not indicate a reply from you, but never mind that for now.

Frankly, we'd like to apologize. First, we spelled your name wrong: a computer error which we assure you will never happen again. Then, Senator Ted Kennedy wasted four pages, and your valuable time, to explain that Ed King, with the backing of far right activists like Ronald Reagan and the John Birch Society, will spend twice as much to defeat Mike Dukakis in 1986 at he did in 1978.

How embarrasing! We paid the freight for Ted Kennedy to put a little scare into you, and hopefully loosen up your pocketbook on the same day Ed King said he would not run.

The Committee has to take full responsibility for this error. We knew that Ed King wasn't going to run. Just ask anybody over at the *Globe*. For months we've been telling them he wouldn't run.

Maybe we let Senator Kennedy go a little too far to settle an old dispute with King. In 1980 Ed King, the Democratic Governor of Massachusetts, appeared in TV commercials around the country endorsing incumbent President Jimmy Carter's campaign against Ted Kennedy's insurgent challenge. This hurt Kennedy, and he must still be feeling the pain.

Nevertheless, it is now clear to all that there will be no contest for Governor in 1986. With Ed King out, and only a few "nay-sayers" to offer up some self-serving but groundless noise, we fully expect Governor Dukakis to win by acclamation this year.

Therefore, the committee, at the request of the Governor, has decided to discontinue its fundraising efforts. Further, the Governor has insisted that all unspent campaign funds be returned, pro-rata, to his financial supporters.

Please rest assured that should the need arise to solicit you again later this year, we will be sure to frame our appeal on the Governor's many accomplishments, such as roadblocks, and the mandatory seat belt law: not by drumming up some bogey man non-candidate like Ed King.

Again, we apologize for our letter of last week and ask that you kindly disregard it.

Sincerely,
The Dukakis Committee

Appendix G.

Ed King's promises not money in bank

David Farrell

After the controversial Primary Source liquor bill squeaked through the House and Senate at the end of October, chain store owner Freddy Martignetti breathed a sigh of relief. All that he needed was the signature of Gov. Edward J. King.

Martignetti and the governor had discussed the bill and Martignetti's industry problems on several occasions during recent years. And he had King's word that he would sign the measure. That was like having money in the bank.

Martignetti and King had been good friends since their BC High days when Freddy and twin brother Joe met King. The Freddy Martignettis and the Kings socialized over the years, at house parties and other get-togethers. The athletic prowess of the Martignetti children was another bond with the governor, who is well known for his partiality to and idolization of athletes. Most recently, King and Freddy spent considerable time together at the wedding and reception for one of the Martignetti children several weeks ago.

Now for the first time in seven years, Freddy Martignetti could see some daylight in his long battle with the State Alcoholic Beverages Control Commission (ABCC) and the courts over the number of package stores he may legally operate.

Bill's opponents knew their man

The 56-year-old Martignetti knew that the commission decisions which mandated him to get rid of some of his stores because he violated the spirit of the three-store statute would stand, no matter what happened to the Primary Source bill.

But enactment and signing of the measure, whose main provision would bar retail outlets from dealing with out-of-state wholesalers, also would mean that the three-license limit would be scrapped and raised to a seven-license plateau. Martignetti thus would be able to reshuffle his empire and get his business back to the successful peak it enjoyed before the ABCC moved against him.

But while Martignetti, Bruce Wright, Sam Stone and other proponents of Primary Source were laboring so diligently to get the legislation through the House and Senate, opponents, led by Whitehall's Marvin Gordon, came up with a clever strategy that would have appeal only to a governor of King's peculiar makeup.

King was being pressured by public interest groups and some of his own advisers to sign the bottle bill that was so strongly opposed by all liquor interests, Martignetti included, on both sides of the Primary Source controversy. To make it appear that he was seriously weighing the merits of the bottle bill, King even went to Michigan to review that state's excellent experience with its bottle law.

Since Primary Source had been painted by its opponents as an anti-consumer bill which would hike the price of liquor in Massachusetts and send consumers here to New Hampshire liquor stores, why not blunt the anticipated consumer outrage over a bottle bill veto with a veto of Primary Source? King was asked.

The governor, who had teased the public all summer with his well-orchestrated charade about "rethinking" his previous stand against the bottle bill, jumped at the inviting prospect of mitigating the public outcry against his rejection of the anti-litter legislation with his pitch to the consumer on Primary Source.

It didn't matter to King that the liquor legislation was fashioned by his own special commission and tailored pre-

cisely along lines dictated by him. That panel, headed by King's ABCC chairman, John Larkin, labored for months to produce the bill for King.

So it was on the eve of Halloween when Freddy Martignetti learned that Ed King, his pal, planned to veto Primary Source.

"I'm sick. I can't believe it," a stunned Martignetti told everyone he ran into during the next 48 hours.

He couldn't believe that his longtime friend could welch on the commitment and go back on his word. Sure, he had heard some of the many stories about King's unreliability, but he either didn't believe them or didn't want to, on the assumption that his bond with "Eddie" transcended any possibility of a run-out by the governor.

At least he isn't alone

When Martignetti finally got in to see King last Wednesday to discuss the matter, the answer was the same. King tried to soften the blow by suggesting that he could send a special message to take care of Martignetti's package store problem, but Martignetti wasn't taken in, knowing there was no chance such a proposal could survive by itself.

Thus does Martignetti join a growing list of people, many of them former friends of the governor, who have been duped by the chief executive. The list of Walter Hurleys, Paul Heffernans et al is too long to detail in this space. Frank Rich, who grew up with the governor in East Boston, is the most notable of the group. He got burned so often by King's failure to keep his word and commitments that he decided to run against him.

King's next walkout will embrace Quincy Mayor Arthur Tobin, a former state senator who had expected to be appointed clerk/magistrate of Quincy District Court.

When former clerk Dinny Ryan died earlier this year, King confided in intermediaries that Tobin was in the

driver's seat for the position. So certain was Tobin of that commitment that he did not seek re-election last week.

But now King has had his faithful servants on his Judicial Nominating Committee come up with another candidate — this one an assistant court clerk in Plymouth County — and Tobin will be sacrificed. The upcoming bypass of Tobin has worsened the governor's already poor relations in the Senate where Tobin was a popular member. And it has relegated Senate President William M. Bulger's break with King to point-of-no-return status.

Intermediaries have been trying to heal the chasm between Bulger and King, but to no avail. Now their differences are irreconcilable.

In his dealings with the Senate leader, with House Speaker Thomas W. McGee and virtually everyone else in state government, King has demonstrated an attitude which demands total obeisance in exchange for whatever patronage crumbs the governor sees fit to dispense.

It has taken some political figures a long time to realize that King operates on a one-way street and regards all other state officials — duly elected constitutional officers, elected legislators, judges and other members of the judiciary — as subordinates of the executive, with their principal function to serve him, the master.

That condescending attitude never was more in evidence than in October when King called a judge and demanded that he change a decision he had rendered in a gang-rape case. The judge acquiesced and proved two things: 1.) King's original appointment of him was a colossal blunder. 2.) He is unfit to remain on the bench.

David Farrell is a Globe political columnist.

Appendix H.

MISSING VIP

David Farrell

When the S.S. Volendam sailed from Commonwealth Pier on Gov. Edward J. King's "Cruise To Nowhere" fundraiser a fortnight ago, there was one VIP missing from the passenger list. David R. (Dick) Thissen, controversial head of the Desmond & Lord architectural firm, which ran aground during a long investigation by the Special Commission on State and County Buildings last year, passed up the opportunity to spend the night in Massachusetts Bay with King, his longtime friend, business partner and vacation companion.

Under normal conditions, Thissen would have been aboard the liner during the all-night bash, which cost contributors to the governor's re-election campaign $200.

But these are not usual times for Thissen, whose hard-pressed firm merged with John Carl Warnecke & Associates two years ago when it became apparent that the probe of Desmond & Lord by the Ward commission was having a devastating effect on D & L's ability to attract new architectural business in this area. Thissen and the new firm's owner, John Carl Warnecke, have collaborated on several architectural jobs awarded Thissen's old firm during the past two decades.

The personable Thissen, once highly visible, has become a political recluse of sorts and is avoiding the spotlight as much as possible. He still swims at the University Club but is seldom seen at many of the haunts he used to frequent.

It wasn't long ago that he and the governor dined on a regular basis at various restaurants in the metropolitan area.

But all that has changed because of the adverse impact the Ward commission notoriety has had on Thissen ability's [sic] to generate business for the Warnecke firm.

Except for an occasional fundraiser or wedding reception, the two friends rarely get together, as they once did, at such popular restaurants as Anthony's Pier 4 and Jimmy's Harborside. The last time this occurred was about 10 weeks ago when Secretary of Administration and Finance Edward Hanley invited Thissen to the wedding reception for one of his daughters at Pier 4. That, in itself, was surprising since Hanley has never associated with or been an admirer of Thissen. Hanley privately places much of the blame for the deterioration of King's public image on Thissen.

The governor has never run away from Thissen, even in the face of strong recommendations by Hanley et al that he would be better off putting some distance between himself and Thissen. This personal loyalty King manifests towards associates never was more apparent than during the recent in-fighting over a satisfactory racing bill for the industry. Despite his close association with out-of-state dog racing promoter Eddie Keelan, King has made no secret of his efforts to [illegible] Keelan's bidding on the legislation that would greatly benefit the harness track at Foxborough owned by Keelan and his partners.

King still slips out of town with Thissen. They went to Saratoga for the races last August as they do every summer. Over the Easter holidays last spring, they were at the races in Florida. And this Christmas, as they do every Christmas, they are expected to be together in Miami for the winter racing season.

Thissen's pass-up of King's invitation to join him at the Miami Dolphins-Patriots football game here two Sundays ago is indicative of Thissen's plan to make himself more scarce as the 1982 gubernatorial campaign builds.

He is a very close friend and golfing partner of US House Speaker Thomas P. (Tip) O'Neill Jr., a fact which puts him in an embarrassing middle as the upcoming battle by Lt. Gov. Thomas P. O'Neill 3d to wrest the governorship from King intensifies. Over the three decades since the elder O'Neill was speaker of the Massachusetts House, Thissen has been an intimate.

What makes the situation difficult for Thissen is that O'Neill's son, the lieutenant governor, has been attacking King (and former Gov. Michael S. Dukakis) with increasing tempo of late. As a result, Thissen, who has been a most generous campaign donor to the governor and both O'Neills, will have to sit out the 1982 battle and content himself with giving them equal contributions.

Dukakis, meanwhile, is planning to make the close relationship between King and Thissen part of his own campaign for another term. The ex-governor's campaign strategists are also assuming that the Thissen association with the O'Neill family will not be overlooked by the electorate.

Dukakis is expected to focus on the King-Thissen links, particularly their efforts to undermine and thwart the work of the Ward commission in 1979 and 1980.

Thissen and King still maintain close busines relationships. They are in the coal business with Red Sox players Carl Yastrzemski and Dwight Evans. The four have invested some $300,000, according to Yastrzemski, in a West Virginia coal mine which has not done well. They recently replaced the general manager of coal operations in an effort to get more production and profits.

On the side, Thissen, who always has had a sharp eye for good investments, continues to develop other relationships with men such as Bruins' president Paul Mooney.

Still unresolved and ahead of him is the allegation by the Ward commission that his former firm illegally contributed $1100 to Gov. King's 1978 campaign through a Desmond & Lord secretary. The commission referred that matter to Atty. Gen. Francis X. Bellotti, who is expected to make a decision on it soon.

David Farrell is a Globe political columnist.

Appendix C.

BINGHAM, DANA & GOULD
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September 17, 1987

The Honorable Herbert P. Wilkins
Associate Justice
Supreme Judicial Court
New Court House
Pemberton Square
Boston, MA 02108

Re: Edward J. King v. The Globe Newspaper Company, et al.
Docket No. S-4296

Dear Justice Wilkins:

In this case, this court held for the first time that actual malice could be inferred even though a writer had a source whose "veracity and accuracy" the writer had no obvious reason to doubt. Whether constitutional malice may be found in such circumstances was not briefed by either party.[1] This court's rulings is inconsistent with Supreme Court cases and

[1] The Governor did not argue that malice could exist if Farrell had a source, but that Farrell should be disbelieved in saying he had a source. Brief of Appellant at 48-50. Similarly, defendants started from the premise that the existence of a source negated a finding of malice. Brief of Appellees at 34.

with the facts in the record. Pursuant to Mass. R. App. P. 27, The Globe Newspaper Company and David Farrell hereby petition for a rehearing and opportunity to be heard on this single issue.

I.

The Farrell column of November 8, 1981 stated that the Governor "called a judge and demanded that he change a decision that he rendered in a gang-rape case." After deciding that the statement could be defamatory, this Court considered whether there was sufficient evidence of actual malice to reverse the Superior Court's grant of summary judgment. Opinion at 18-23. This Court recognized that no evidence existed that Farrell had fabricated the statement. Indeed, Farrell's source, State Treasurer Crane, had been identified and deposed and had confirmed that he was the source. This Court also recognized that no direct evidence existed that Farrell had serious doubts as to the truth of the statement. The inquiry was whether the record contained sufficiently "clear and convincing" circumstantial evidence that a jury could infer that Farrell actually "entertained serious doubts about the truth" of his statement. Opinion at 20.

What evidence exists which can "demonstrate to a jury to a clear convincing degree", Opinion at 20, that Farrell entertained serious doubts about the truth of his statement? Ultimately, this Court pointed to three factors: (i) Farrell's source, Treasurer Crane, did not purport himself to have overheard the telephone call. Opinion at 21. (ii) Farrell did not investigate further — he neither called the judge nor asked for the Treasurer's source. *Id.* (iii) Such a call would have been "highly unusual" and "serious." Opinion at 20-21.[2]

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[2] All three factors probably are permutations of a claim of failure to investigate. Failure to investigate is insufficient to establish malice. *St.*

From these factors, this Court concluded that "Farrell had obvious reasons to doubt the veracity and accuracy, not of Crane, but of Crane's undisclosed informant and any other informants in the chain of communication." Opinion at 22.

II.

The Opinion does not cite any case where the writer had a source whose "veracity and accuracy" he had no reason to doubt which resulted in a finding of actual malice. The omission is significant and heralds a new and impermissible shift in libel law. Ultimately, the opinion must rely on *St. Amant* v. *Thompson,* 390 U.S. 727 (1968). Opinion on 19-20, 22. *St. Amant* taught that a speaker who entertained "serious doubts as to the truth of his publication" acted with reckless disregard for the truth and thereby satisfied the actual malice test. Opinion at 19. Significantly, the focus is on the speaker's state of mind. The sole issue becomes whether Farrell doubted Treasurer Crane, not whether Farrell should have believed the Treasurer. First, the uncontroverted evidence does not support an inference that Farrell doubted Crane. Second, Supreme Court cases demonstrate that the factors upon which this Court relied may not give rise to an inference of serious doubt.

III.

Treasurer Crane was a friend, ally and fundraiser of the Governor. Exh. 7, Tab 25, King IV 71-72.[3] The Treasurer

Amant v. *Thompson,* 390 U.S. 727, 733 (1968). That fact is not surprising since it is difficult to draw any inference about a writer's state of mind from failure to investigate further, other than he believed the statement. More importantly, these factors really pertain to a negligence or due care standard. It is precisely such a standard which *New York Times* v. *Sullivan,* 376 U.S. 254 (1964) and its progeny prohibit.

[3] Crane testified about the Governor: "I admired him then, I admire him now, and I admired him when he went out of office and I walked down the stairs with him." App. Vol. 2, Tab 26 at 543 (Crane 143).

also was a "close friend" of Farrell. App. Vol. 2, Tab 26 at 481 (Crane 33). The Farrell-Crane relationship was such that Crane did not "think he'd [Farrell] doubt anything I ever told him." App. Vol. 2, Tab 26, at 536 (Crane 132.) Crane explained why Farrell would believe the statement about the call: "He would believe it for two reasons, one, he knows me, and two, he knows the high esteem I have for Governor King." App. Vol. 2, Tab 26 at 536 (Crane 132). While Crane acknowledged that he had not heard of such a call to a judge on any other occasion, he placed the statement in context: "I also said that I never knew a Governor who worked seven days a week in the State House and entertained people all day long Saturdays and Sundays." App. Vol 2, Tab 26, at 537 (Crane 133).

Farrell himself amply demonstrated during cross-examination why he believed the Treasurer. Farrell testified that Crane "always" told him the truth[4] and, more importantly, that Farrell had "*always found him accurate* [sic]." App. Vol. I, Tab 25 at 416 (Farrell at 155) (emphasis added). While such a call might have been unusual, Farrell explained why it was credible: "I've talked to many politicians, including the Senate President and others during the Governor's regime, and they're all kind of amused about the Governor's attitude that he is a take-charge guy and believes that everyone is working for him." App. Vol. I, Tab 25 at 400 (Farrell 122). Later, Farrell reiterated, "I was amused by it. Eddie is a take-charge guy, and if something is out of order, directly himself [sic]. That was my understanding of the way he worked at Massport." App. Vol. 2, Tab 25 at 411 (Farrell 137).

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[4] Farrell was consistent with the Governor who swore that he had never had reason to question the Treasurer's honesty. Exh. 7, Tab 25, King IV 71-72.

The point, as this Court acknowledged, is that Farrell was an experienced State House columnist. He had years of background with the personalities involved. With his perception of the Governor and his history with the Treasurer, Farrell observed the Governor's well-orchestrated public criticism of the judge — a radio appearance, a press conference, public correspondence to the Judicial Conduct Commission and to the Chief Justice of the Superior Court, introduction of legislation — immediately followed by the (highly unusual) *sua sponte* revocation of the sentence by the judge. There simply is no evidence from which to infer that Farrell doubted (or even should have doubted) the statement made to him by Treasurer Crane.[5]

IV.

Analysis of the facts (and, thus, actual holdings) of *St. Amant* and *New York Times* demonstrates that the factors upon which this Court relied may not support an inference of constitutional malice. In *St. Amant*, a candidate for public office (St. Amant), in a televised speech, accused a deputy sheriff of, among other things, taking bribes from a union official. In a passage which parallels this Court's discussion on pages 21-22, the Supreme Court noted: "St. Amant had no personal knowledge of Thompson's activities, he relied solely on Albin's affidavit although the record was silent as to Albin's reputation for veracity; he failed to verify the information with those in the union office who might have known the facts. He gave no consideration to whether or not the statements defamed Thompson and went ahead heedless of the consequences. . . ." 390 U.S. at 730. St. Amant's

[5] Consider the Treasurer's attitude when he made the remark to Farrell: "I saw no significance in the fact that the Governor may or may not have called the judge. I didn't say that as if the Governor did a bad thing." App. Vol. 2, Tab 26 at 537 (Crane 133).

source (Albin) hardly was objective as he was engaged in an internal union power struggle at the time. 390 U.S. at 733. The Supreme Court, in its famous dictum, did acknowledge that a defendant who "entertained serious doubts" as to truth of his statements would satisfy the malice test. The Court, nevertheless, resoundingly reversed the jury verdict in favor of the plaintiff. "By no proper test of reckless disregard was St. Amant's broadcast a reckless publication about a public officer." 390 U.S. 732. This Court's holding flatly is inconsistent with *St. Amant*. There is less basis in this record for inferring serious doubt than there was in *St. Amant*.[6]

The types of factors which this Court used to support an inference of malice were present in the seminal *New York Times Co.* v. *Sullivan* case. The *Times* published an advertisement which contained a number of false (and unusual) charges. In commenting about police activity in Montgomery, Alabama, the publication asserted, *inter alia,* that "after students sang 'My Country, 'Tis of Thee' on the State Capital steps, their leaders were expelled from school, and truckloads of police armed with shotguns and tear-gas ringed the Alabama State College Campus. When the entire student body . . . [refused] to re-register, their dining hall was padlocked in an attempt to starve them into submission." 376 U.S. at 257. The *Times* had in its files at the time of publication information which disproved some of the charges.

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[6] Dictum in *St. Amant* also acknowledged that if "allegations are so inherently improbable that only a reckless man would have put them in circulation," they could give rise to an inference of malice. 390 U.S. at 732. This Court seemed to equate "inherently improbable" with "highly unusual." Opinion at 22. To say a report is "highly unusual" is simply to say that it is newsworthy. Moreover, it is hard to understand why an outraged governor calling a judge somehow is more "inherently improbable" than the charges in *St. Amant* that an individual had corrupted both the state police and sheriff's office. 390 U.S. at 729.

376 U.S. at 263. The *Times* had made no effort to confirm the accuracy of its publication. 376 U.S. at 261. Publication was based upon the reputation of the individual (A. Philip Randolph) who had submitted the copy and had represented that the individuals whose names appeared on it had given permission for the use of their names. (Some had not.) The case involved publication of material based on hearsay, a failure to investigate, corporate knowledge to the contrary and, at least as relates to the alleged attempt to starve an entire student body, highly unusual and improbable activity. Yet, these are the very facts upon which the Supreme Court chose to reverse a jury and promulgate the actual malice standard. This Court's ruling is not consistent with *New York Times*.

Given *New York Times* and *St. Amant*, it is no accident that the law has developed so that "defendants have been held to be free of 'actual malice' despite a general failure to investigate, failure to talk to the plaintiff before publication, failure to verify information, publication of material incapable of verification, failure to discover the published material relied upon had late been retracted, and failure to discover contradictory material in the defendant's files. . . ." Sack, *Libel, Slander and Related Problems* 219 (1980) (Citations omitted).[7]

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[7] See also *New York Times* v. *Connor*, 365 F.2d 567, 574 (5th Cir. 1986). Harrison Salisbury wrote that Birmingham Police customarily held people charged with vagrancy without bail for three days. Salisbury's source was an individual who had "heard" of the practice. That fact did not give rise to an inference of malice. *Hardin* v. *Santa Fe Reporter, Inc.* 745 F.2d 1323 (10th Cir. 1984) involved a false claim that a State Department employee participated in police torture in South America. The report was based on an informant whose background and information defendants had failed to verify. The court held that these allegations could demonstrate negligence, but did not give rise to an inference of malice.

V.

The factors which this Court used to support the inference that Farrell doubted the truth of his statement prove both too little and too much. They prove too little in that they do not support an inference of serious doubt. The fact that Farrell relied on hearsay does not mean that he did not believe the statement. Farrell was an "experienced journalist" who had covered the State House and had known the personalities involved for years. He had observed the Governor's public actions after the Holbrook rape case. There is nothing in the record from which fairly to infer that Farrell thought such a call was improbable. Similarly, Farrell's failure to investigate further gives rise, if anything, to an inference that Farrell believed Crane.

The unusual nature of such a call hardly meant that Farrell disbelieved the statement. As noted above, Farrell viewed the scene from his familiarity with the people involved and the previous public events. Consider the use that the "experienced journalist" made of the information. He did not promptly break it in a news story. He sat on it for several weeks and only then used it at the very tail end of a column to illustrate a point. Neither Farrell nor *The Boston Globe* ever treated the statement as particularly newsworthy. Reporters with "highly unusual" and significant information do not act this way.

More importantly, the three factors prove too much. Their use eviscerates *New York Times* and its progeny. Miscreants typically do not volunteer information. Reporters are paid to sniff out the unusual. Lawyers can always argue — as they do in products liability cases — that further investigation was warranted.[8] Reliance upon these factors to justify an inference of doubt emasculates the protections of *New*

[8] This case does not involve a failure to investigate — Farrell had a source. The claim has to be that Farrell did not investigate enough.

York Times since these types of arguments frequently can be made in public figure libel cases. It is no accident that this Court's opinion cited no case for the key proposition and that these types of factors have been held not to give rise to an inference of malice as a matter of law.

If the press is to function as the eyes and ears of free people; if it is to continue to write the first draft of history, it must have breathing room. It must have the freedom, on occasion, to misperceive. *New York Times* stands for no less. During times of shadow governments and efforts to preserve "deniability" — the ability to mislead without accountability — our people would be ill-served by sanitizing newspapers so that their contents are governed by rules of hearsay, and publishing the "highly unusual" becomes a basis upon which to infer malice.

VI.

Defendants ask this Court to reconsider its ruling that actual malice may be inferred on the record of this case. Alternatively, defendants ask that this Court set the issue down for full briefing and argument.

Respectfully submitted,

Joseph L. Kociubes

JLK/lg
4834n

cc: Robert H. Goldman, Esq.

Appendix D.

COMMONWEALTH OF MASSACHUSETTS

SUPREME JUDICIAL COURT FOR THE COMMONWEALTH,
AT BOSTON, October 28, 1987

IN THE CASE NO. SJC-4296

EDWARD J. KING

vs.

GLOBE NEWSPAPER COMPANY & others

pending in the Superior

Court for the County of Suffolk No. 52488

ORDER

It is hereby Ordered, that the Petitions for Rehearing be, and hereby are, dénied.

It is further ORDERED that the Motion to Stay Issuance of Rescript is denied.

By the COURT,
/s/Jean M. Kennett, CLERK.

October 28, 1987

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